In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 60

PAUL POE ET AL. *Appellants*

vs.

ABRAHAM ULLMAN, STATE'S ATTORNEY *Appellee*

JANE DOE *Appellant*

vs.

ABRAHAM ULLMAN, STATE'S ATTORNEY *Appellee*

No. 61

C. LEE BUXTON *Appellant*

vs.

ABRAHAM ULLMAN, STATE'S ATTORNEY *Appellee*

On Appeal from the Supreme Court of Errors of Connecticut

BRIEF FOR APPELLANTS

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OPINION BELOW

The opinion of the Supreme Court of Errors of Connecticut rendered December 8th, 1959, is reported in 147 Conn. 48, 156 A. 2d 508. (R. p. 25)

JURISDICTION

All appellants filed their writs and complaints in the Superior Court of New Haven County, Connecticut, on May 22, 1958, pursuant to Section 52-29 General Statutes of Connecticut, Revision of 1958. The complaints sought a declaratory judgment that Sections 54-196 and 53-32 of the General Statutes of Connecticut, Revision of 1958, are unconstitutional on their face or as applied to them. (R. pp. 1, 5, 10)

Appellee Ullman filed a demurrer to each of said complaints which was sustained by the Superior Court of New Haven County, Connecticut, in a memorandum decision filed January 5, 1959. Thereafter a motion for judgment after demurrer dismissing each of said actions was sustained by said court in a ruling entered on January 30, 1959. (R. p. 19)

Appellants thereupon filed their appeal to the Supreme Court of Errors of Connecticut on February 11, 1959. (R. p. 23) Thereafter on December 8th, the Supreme Court of Errors of Connecticut affirmed the judgment of the Superior Court. (R. pp. 35, 36, 37)

Notices of appeal to the Supreme Court of the United States were filed with the Supreme Court of Errors of Connecticut on February 19th, 1960. (R. pp. 38, 39, 40)

Each of these causes presents a justiciable issue. The conditions which establish the validity of the declaratory procedure were recently set forth by this Court in *Evers* vs. *Dwyer*, 358 U. S. 202. These cases meet the test. All appellants have standing to sue since their vital interests are threatened. Their liberty, their lives and their health are involved.

There is a real and substantial controversy presented in each case. Appellants Doe and Poes require and seek medical advice with respect to contraceptive devices and their use which they intend to employ to preserve their lives and their physical and emotional

health. They are unable to obtain such advice and to use such contraceptive devices and instruments although appellant Buxton, their physician, desires to prescribe for them, for the sole reason that appellee claims that both the giving of such advice and treatment by their physician as well as the use of such instruments and devices are offenses under Sections 53-32 and 54-196 General Statutes of Connecticut, Revision of 1958, and that he will prosecute (as indeed he has heretofore prosecuted in *State* vs. *Nelson*, 126 Conn. 492) any violation of said statutes. Appellants claim and appellee denies that the said statutes, on their face and as applied to them, violate the Fourteenth Amendment to the Constitution of the United States. Each question was raised and passed upon by the state court.

The questions raised here are not hypothetical nor are they contingent. What appellants Doe and Poes desire and propose to do in order to protect their lives, health and marital happiness is not speculative. It is definite and is clearly in violation of the challenged statutes. Nor is the threat to them vague or conditional. It is actual, specific and immediate—not fanciful, general or remote. The appellee has previously prosecuted such violations and declares that he will prosecute further violations. "Definite rights" appear on the one side and "definite prejudicial interferences" on the other. Appellants do not seek an advisory opinion. As to them, the controversy is all too real. Certainly the facts alleged and admitted "show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Evers* vs. *Dwyer*, *supra* at 203, quoting from *Maryland Casualty Co.* vs. *Pacific Coal and Oil Co.*, 312 U. S. 270, 273. Appellant Buxton is in a similar legal situation. He desires to prescribe contraceptives to protect the lives and health, physical and mental of the other appellants but is prevented from doing so because of the threat of prosecution under these laws by appellee Ullman.

All appellants are entitled to have these important constitutional questions settled insofar as their claimed rights are concerned and one of the purposes of the declaratory judgment procedure is to afford a method for such determination without subjecting them to the risk of fine or imprisonment or both and, in the case of appellant Buxton, the loss of his license to practice his profession. Borchard, *Challenging Penal Statutes by Declaratory Actions*, 52 *Yale L. J.* 445.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Errors of Connecticut on appeal is conferred by Title 28, United States Code, Section 1275(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on appeal in these cases. *Nashville C. & St. L. R. Co.* vs. *Wallace*, 288 U. S. 249; *Evers* vs. *Dwyer, supra* at 202; *Butler* vs. *Michigan*, 352 U. S. 380.

QUESTIONS PRESENTED

Whether Section 53-32, the general accessory statute and Section 54-196 of the General Statutes of Connecticut which makes it a criminal offense for any person to "use any drug, medicinal article or instrument for the purpose of preventing conception" are unconstitutional on their face or as applied to all appellants, in that the laws deprive them of life, liberty or property without due process of law contrary to the 14th Amendment of the Constitution of the United States.

STATUTES INVOLVED

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958:

Section 53-32, General Statutes of Connecticut, Revision of 1958:

> "Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument

for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 54-196, General Statutes of Connecticut, Revision of 1958:

"Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

STATEMENT OF THE CASES

Appellant Jane Doe is a housewife who has continuously resided with her husband in New Haven since their marriage in 1954. She is 27 years old and has no living children.

Mrs. Doe was admitted to the obstetrical services of the Grace-New Haven Hospital in January, 1957, with the diagnosis of hypertensive cardio-vascular disease, toxemia of pregnancy Cushing's syndrome. It was determined by physicians in authority to terminate her pregnancy because of her condition. However, on January 28, 1957, before this procedure could be carried out, Mrs. Doe developed a cerebral hemorrhage which produced a partial paralysis. She was completely unconscious for two weeks and acutely ill for nine weeks during which time it was necessary to apply several life saving procedures. The plan to terminate her pregnancy was abandoned and on June 19, 1957, she spontaneously delivered a still born fetus. Mrs. Doe was dismissed from the hospital with the same heart condition, severe paralysis of the right leg, total paralysis of the right arm, residual kidney damage, marked impairment of speech and serious emotional instability. (R. p. 6)

It is the opinion of appellant's physician, Dr. C. Lee Buxton, that another pregnancy would be exceedingly perilous to life.

The appellant needs and requires and has asked her physician for medical advice to prevent further pregnancies. It is the

opinion of said physician that the best and safest medical treatment would be to inform her as to methods of preventing conception by use of medicinal articles and instruments. Appellant has been unable to obtain such advice and to use such medicinal instruments for the sole reason that the appellee, State's Attorney, claims that the giving of such information and the use of such instruments are prohibited by Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958 and that he will prosecute any violation of such statutes.

Appellant Doe claims that said statutes are unconstitutional on their face and, as applied to her in her condition of health, deprive her of constitutional rights under the due process clause of the 14th Amendment to the Constitution of the United States and in her complaint she asked the state court so to declare. Appellee, State's Attorney, demurred to appellant's complaint thereby admitting all of the aforesaid facts as alleged in appellant's complaint. The demurrer was sustained. After final judgment for appellee dismissing the action, and affirmance by the Supreme Court of Errors of Connecticut, appellant appealed to this Court and prays that the judgment of the Connecticut courts be reversed and that the statutes in question be declared unconstitutional.

Appellants Paul and Pauline Poe are husband and wife who live together in New Haven. Mr. Poe is a businessman and Mrs. Poe is a housewife. She is 28 years old; he is 32. They have no living children.

Mrs. Poe has had three consecutive pregnancies, each of which has terminated in the delivery of an infant with multiple congenital abnormalities inconsistent with life. The first infant was delivered in January, 1954 with congenital heart disease and kidney abnormality. It died on the 9th day of life. The second child was born in April, 1955, and was a mongoloid with associated renal and cardiac lesions. It expired within six days. The third child was born in October, 1957, with evidence of cerebral and gastro-intestinal maldevelopment. It perished within ten weeks.

It is the opinion of appellant Buxton that even if these children had survived it is highly unlikely that any of them would have had a normal life. The cause of these abnormalities is thought by appellants' physician and other specialists to be genetic but they have been unable to make a successful prognosis and treatment. Appellants have already suffered great emotional distress as a result of these successive tragedies and another pregnancy would be extremely disturbing to their physical and mental health. (R. p. 2)

In other respects, the case of these appellants is similar to that of appellant Doe.

Appellant Buxton is a registered licensed physician and a specialist in obstetrics and gynecology. He was formerly a professor in these specialties at the Columbia-Presbyterian Medical Center in New York and at present is Professor and Chairman of the Department of Obstetrics and Gynecology at Yale University School of Medicine and the Grace-New Haven Community Hospital. Appellant Buxton was and is the physician of appellants Jane Doe and Pauline Poe and it is his medical opinion that the best and safest treatment for these patients is the prescription by him and use by them of devices or instruments to prevent conception and future pregnancies. However, he is unable to administer such treatment and advice for the sole reason that the appellee, State's Attorney, claims that the giving of such advice and treatment by him and the use of such instruments by his patients are prohibited by Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, and that he will prosecute any violation of such statutes. (R. p. 12)

Appellant Buxton claims that the application of said statutes to him as a practicing physician deprives him of his liberty and his property without due process of law contrary to the 14th Amendment of the Constitution of the United States and in his complaint he asked the state court so to declare. Appellee, State's Attorney, demurred to this appellant's complaint thereby admit-

ting all of the aforesaid facts as alleged in appellant's complaint. After final judgment for appellee and affirmance by the Supreme Court of Errors of Connecticut appellant appealed to this Court and prays that the judgment of the Connecticut courts be reversed and that the statutes in question be declared unconstitutional.

SUMMARY OF ARGUMENT

I

The Connecticut laws prohibit the most effective methods of contraception but permit prescription and use of the most unreliable methods. The overwhelming consensus of medical opinion regard the contraceptive practices prohibited by these laws as the most reliable and most acceptable by patients. Only 1.4% of the profession on the basis of extensive sampling regard the rhythm method as reliable. Only 1.5% of the profession recommend abstinence as a method for preventing pregnancies, and 0.7% recommend withdrawal.

II

The Connecticut laws are not reasonably related to the presumed end. The laws are justified by the court below as within the police power of the state to enact restrictions upon the liberty of spouses and their physicians in the interest of public morality. Presumably the laws are supposed to discourage promiscuity. They do not do so because the forbidden devices to prevent conception are lawful and available to prevent disease. This means that they are available to unmarried persons.

III

The laws are not restricted to their presumed purpose. They prevent married spouses from using effective contraceptive devices in order to prevent unmarried persons from using them or to prevent extramarital relations. They thus come within the rule of *Butler* vs. *Michigan, supra.*

IV

The hardship upon individuals and the injurious social consequences of these laws far outweigh any assumed advantages.

A. As a preventive of illicit relations the laws are ineffective. Insofar as it might be presumed that the legislature regarded the use of the forbidden methods as immoral, it is clear that "contemporary community standards" (*Roth* vs. *United States*, 354 U. S. 476) permit, encourage or require their use.

B. As to the harm to individual freedom and to the social order:

1. The laws invade the privacy of the citizen.

Insofar as the laws require abstinence as an alternative to unwanted children they deprive married people of the benefits of consortium, jeopardize the mental health of the spouses and constitute a threat to family stability.

2. The laws result in children whom their parents do not want. Scientific opinion is that unwanted children are unhappier than planned children and are more likely to become anti-social.

3. Parents not only have a right to plan their family according to health standards and economic conditions, but it is the opinion of huge segments of society that they have a moral, if not indeed a religious obligation to do so.

4. It is the opinion of competent obstetricians that many if not most illegal abortions can be traced to a failure to use effective contraceptive devices.

5. The Connecticut laws are utterly unreasonable because (a) they fly in the face of medical science and (b) they tend to bring about an overpopulated world with all the dangers of famine, political unrest and war.

6. The case of appellants, Poes, illustrates the danger that mentally abnormal and defective children result from these laws.

V

The laws are unreasonable in that they jeopardize the lives and health of appellant Doe who will probably die with another pregnancy and appellants Poes who will suffer great emotional travail with the birth of another mongoloid child. Here again abstinence is no reasonable alternative to such a tragedy.

VI

A serological test for venereal disease is required for the issuance of a marriage license in Connecticut. If spouses are faithful, there will be no occasion for the use of the forbidden devices to prevent disease. Unmarried persons, however, may use them. The laws thus discriminate against law-abiding married persons.

VII

Appellant Buxton is unreasonably deprived of a valuable property right in his profession in that, as a specialist in Obstetrics and Gynecology, he is prevented from utilizing the best scientific methods for protecting the health and lives of his patients. There is no appreciable scientific opinion that the forbidden practices are not indicated as the best method for protecting the life and health of appellants Doe and Poes.

ARGUMENT

Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, on their face and as applied to these appellants constitute an attempt to exercise the police power of the state beyond the limitations prescribed by the 14th Amendment to the Constitution of the United States. They deprive appellants of their lives, liberty or property without due process of law.

POINT I

As to all appellants, these laws are arbitrary and capricious in that they make unlawful the most effective and harmless methods of birth control but permit the prescription and use of the most unreliable and least desirable methods. They prohibit the use of drugs, or devices to prevent conception but permit the use of so-called rhythm method, the douche, *coitus interruptus* and abstinence.

Laws purporting to constitute an exercise of the police power of the state by imposing restrictions on the liberty of the individual fail to comply with the requirement of due process of law if they are arbitrary, capricious or discriminatory. *Nebbia* vs. *New York*, 291 U. S. 502; *West Coast Hotel Co.* vs. *Parrish*, 300 U. S. 379; *Jacobson* vs. *Massachusetts*, 197 U. S. 11; *Bolling* vs. *Sharpe*, 347 U. S. 497.

Neither the judicial defenders of the law nor the champions of the Connecticut statute maintain that spouses may not adopt some measures to prevent conception. There is no group, religious or secular, which forbids sexual relations between man and wife except for the purpose of procreation. All religions approve some method to avoid conception. It comes down to a question of what method. Thus some groups endorse the most effective methods as approved by medical science; others prefer less effective methods, as approved by their theology although not approved by medical science. The reasonableness of the Connecticut statute may thus turn on whether this Court will accept scientific or non-scientific judgments on acceptable methods of protecting the happiness, health and lives of married women and checking the overpopulation of the nation and the world.

The clinical effectiveness of the vaginal diaphragm and condom and their superiority over other methods have been repeatedly demonstrated and generally accepted by the medical profession. Perhaps the best technique for the study of human fertility and

its control was developed by Dr. Raymond Pearl.[1] It involves as a yardstick for measuring the relative effectiveness of contraceptive methods the pregnancy rate per 100 years of exposure. To compute this rate the investigator determines for each married couple in the study the duration of exposure to the risk of pregnancy by deducting the aggregate months of married life during which conception was impossible because of pregnancy, separation, or some similar reason. The months of exposure and pregnancies of all couples under observation who used the same methods are added and the pregnancy rate per 100 years of exposure computed.

In a survey of the clinical effectiveness of contraceptives made by Dr. Christopher Tietze and reported in the Proceedings of the Third International Conference on Planned Parenthood in Bombay, 1952, the following results were obtained. In 204 years of exposure the pregnancy rate was 6 for couples who employed the condom. A similar rate was reported by two other investigators. In 935 years of exposure by couples who used the diaphragm the same rate was reported. The slightly different rate of 7 was reported by another investigator involving 472 years of exposure. As against these, a study in Boston of couples representing 606 years of exposure where the rhythm method was employed reported a rate of 14. 324 years of exposure by couples relying upon the douche produced a rate of 36, and 435 years of exposure by couples practicing *coitus interruptus* disclosed a rate of 38.

In another study Guttmacher, Tietze and Rubin found a failure of contraception in 14% of the cases studied with couples relying on the condom, 17.2% by those employing the diaphragm, and 48.2% by persons employing all other methods.[2]

The most recent study was made by the Office of Population Research of Princeton University under the auspices of the Mil-

[1] *The Natural History of Population*, Oxford University Press (1939).

[2] *Journal of the American Medical Association*, Vol. 140, p 1265 (1949).

bank Memorial Fund. It discloses pregnancy rates per 100 years of exposure for the most widely used methods as follows:[3]

Condom	14
Diaphragm	14
Rhythm	38
Douche	41

So far as abstinence is concerned, as a limitation of births, it should be enough to state that it is common knowledge that for all societies in all ages, it has not worked. It is simply too much to ask a young married couple deeply in love to abstain from marital relations for extended periods of time. Nevertheless, the point is documented in this brief. See Point IV, B, 1.

In addition to being highly undependable, *coitus interruptus* is definitely harmful.[4] To a lesser extent other methods may

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[3]See Tietze, *The Condom as a Contraceptive*, Publication No. 5, National Committee on Maternal Health, p. 36 (1960).

[4]"*Coitus Interruptus* is the most widely used and oldest method of contraception. * * * It is usually responsible for a myriad of psychogenic complaints ranging from pruritus vulvae to backache. This method cannot be used by men suffering from premature ejaculation. It is also capable of producing tension in the male and is not too safe a method. The wife, too, will often develop a variety of anxiety reactions because withdrawal separates the genital organs at a time when the emotional climax is at its height, resulting in feelings of severe frustration. It is the worst possible method of birth control." Kroger and Freed, *Psychosomatic Gynecology*, p. 276 (1951). See also Freud, *Collected Papers*, Vol. 1, pp. 88, 147, 273 (London, 1950).

". . . [O]pponents of contraception have sometimes sought to support their objection, which is fundamentally on the plane of values, by saying that the practice is physically harmful. Medical opinion is now decisively the other way, and is indeed almost unanimous that the harm, if any, is done not by contraception but by continued repression, and by the practice of the so-called 'natural' method of family limitation which is veiled in the decent obscurity of the Latin phrase *coitus interruptus*." Williams, *The Sanctity of Life and the Criminal Law*, p. 46 (1957).

create anxiety because of their fallibility, or by the fact that their effective use depends on the cooperation of the husband.[5]

The psychological effect upon women produced by fear of unwanted pregnancy is well understood by psychiatrists. Actually it need not be regarded as pathologic, but, as has been pointed out by a distinguished scientist, "it can produce the effect of a direct inhibition, particularly if it is obsessively exaggerated, as is often the case."[6]

None of the less satisfactory means of contraception is in fact withheld from the public by the Connecticut statute. It is only the safest, the least anxiety-provoking and most esthetic, the diaphragm and condom, which are effectively interfered with.

It seems clear that while no method of contraception has yet been devised which is foolproof, those depending upon the fickle cooperation of nature are the least reliable.[7]

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[5] "Various personality difficulties can come to men from unwise measures to which they resort because of the problem of too frequent pregnancies at home. The tension of self-enforced continence is one. Conflict and remorse and strain connected with extra-marital relation is far more common. Sometimes serious inferiority states due to substitute procedures are present." Favill, "Scientific Birth Control and Marital Health," *Birth Control Review*, Vol. XXII, No. 2 (1937). See also Crossen, *Diseases of Women*, p. 213 (10th ed., 1953).

[6] Deutsch, *The Psychology of Women*, Vol. II, p. 93 (1945).

[7] "No survey of contraceptive methods would be complete without a warning against reliance on the so-called 'safe period' * * *. This, in spite of the fact that large numbers of cases have been reported where pregnancies have occurred as a result of intercourse at all times in the cycle, not excluding intercourse during menstruation itself. This recommendation [safe period] based on theories of Knaus-Ogino has recently been shown to be thoroughly unsound as a result of the researches of Professor Stieve, M.D. of Berlin in his monograph entitled 'The Influence of the Nervous System on the Structure and Activity of the Sex Organs of Human Beings' based on 30 years intensive work. He has, for good and all, blown the 'safe period' or 'rhythm

Guttmacher, in a poll of 3,381 physicians, found the following results as to patient acceptability, degree of trustworthiness and prescription by them.[8]

Reliability and Acceptability of Methods Prescribed

Method	Percentage of Doctors Indicating Technique As First Choice For Prescription	Reliability	Acceptability
No. of doctors indicating one or more techniques	2,516	2,726	2,739
		Per Cent	
Diaphragm and jelly or cream	69.6	62.1	67.1
Condom	6.5	14.1	9.4
Rhythm	4.7	1.4	4.7
Condom and jelly or cream	3.7	7.7	4.3
Jelly or cream alone	3.5	1.5	6.5
Cervical cap	2.3	1.8	2.2
Abstinence	1.5	8.0	1.2
Douches	2.4	0.8	2.0
Intracervical stem pessary	1.3	2.2	1.4
Foam Powder and Sponge	0.4	0.1	0.2
Suppositories	0.6	0.1	0.8
Withdrawal	0.7	0.3	0.2

period' sky high. Haire, "Methods of Contraception," *Indian Medical Journal*, Vol. 46 (1952).

"The rhythm method for the control of conception is sanctioned by groups which oppose other methods of contraception, because it is 'natural.' It is, to be sure, more natural in the physical relationship of intercourse than the condom, the diaphragm or any of the chemical methods. Psychologically, however, it cannot be said to be as natural as these latter methods because, regardless of the inclination of husband and wife, it dictates the time when intercourse shall take place and limits its frequency by about 50% as compared to the frequency reported among normal married couples." *Janney, Medical Gynecology*, p. 398 (1950). See also Kroeger & Freed, *Psychosomatic Gynecology*, pp. 273 ff. (1951); Holland, *British Obstetric and Gynecological Practice*, pp. 756-757 (1958); Emil Novak and Edmund Novak, *Textbook of Gynecology*, p. 607 (1956).

[8] *Human Fertility*, Vol. 12, No. 1, March, 1947.

Why has this problem tormented people of all societies? The origins of attempts to control fertility are buried in the misty past. Obviously this is something that all cultures have regarded as vital. Many tried infanticide. This solution was particularly difficult for the mother—perhaps, to a lesser degree for the father. Other devices were originated. Some tried magic. It didn't work either. What is one to think of a remedy which requires the wife to swallow 24 fresh tadpoles in two days in the spring to prevent conception for five years?[9] This would be lawful in Connecticut. But the use of a diaphragm, on a physician's prescription is a crime. Is this a situation which reasonable men, in 1960, can tolerate?

POINT II

These laws are unconstitutional on their face and particularly as applied to all these appellants because they are not reasonably related to the evil which they are intended to abate.

There are no legislative findings with respect to the conditions which gave rise to the enactment of this legislation nor as to the purpose thereof. Actually, the statute was enacted in 1879, as a part of a general obscenity law, entitled "An Act to Amend an Act concerning Offenses against Decency, Morality and Humanity." See dissenting opinion in *Tileston* vs. *Ullman*, 129 Conn. 84, 98 Presumably the statute is intended to promote the public welfare by restricting immoral practices. The only specific immoral behavior suggested by the Supreme Court of Errors of Connecticut is the prevention of illicit relations on the theory that the free availability and use of contraceptives would tend to encourage promiscuity. See *State* vs. *Nelson*, *supra* at 425. This argument fails because these laws do not prevent the sale or use of devices for the prevention of disease. See *Commonwealth* vs. *Corbett*, 307 Mass. 7, 29 N.E. (2d) 151; *Commonwealth* vs.

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[9]See *Fagley, The Population Explosion and Christian Responsibility*, pp. 90, 91 (1960).

Werlinsky, 307 Mass. 608, 29 N. E. (2d) 150, cited with apparent approval in *Tileston* vs. *Ullman*, *supra* at 91. Nor are contraceptives subject to seizure by the state. *State* vs. *Certain Contraceptive Materials*, 126 Conn. 428. Due process requires that "the means adopted shall have a real and substantial relation to the object sought to be obtained." *Nebbia* vs. *New York*, *supra* at 525. Since the same devices which prevent the transmission of venereal disease as a result of intercourse also prevent conception, the law does not and cannot accomplish its purpose.

Sec. 1-19, General Statutes of Connecticut declares that all records and files of all departments, agencies and commissions are public records, unless expressly otherwise provided. On September 15, 1954, the State Commissioner of Food and Drugs wrote to the Secretary of the Bridgeport Pharmaceutical Association, in part, as follows:

> "Since diaphragms have such therapeutic and other uses there is no reason why vaginal diaphragms may not be prescribed or ordered by a physician and such order filled by a pharmacist. We have always taken the stand that a pharmacist is entirely within his rights to fill any prescription or order from a physician. Such order may be given orally or in writing."

POINT III

These laws are unconstitutional on their face and particularly as applied to all these appellants because they are not reasonably restricted to the evil they are supposed to avert.

We have contended that the statutes in question are not reasonably related to that evil. Assuming, however, that there is such a relation, the acts are constitutionally vulnerable to another objection. They are not reasonably restricted to that evil. To be sure, some limitations on personal liberty are permissible when necessary to the attainment of a legitimate legislative objective. But the legislature may not curtail constitutionally protected

rights unnecessarily and arbitrarily in order to avert an admitted social evil. It cannot throw the baby out with the bath water.

In the decisions of the Supreme Court of Errors the only specific objective of the Connecticut statutes mentioned is that they will tend to prevent sexual immorality. This can only mean that the legislative purpose in enacting the statutes in question was to prevent meretricious relations between unmarried persons and possibly between married and unmarried persons. There is nothing either in the opinions of the Court of Errors or in the legislative history of the Acts to suggest that there is any intention to prevent the spacing of families by married persons or that such spacing is considered immoral by the legislators.

We here have a situation where the legislature prohibits the most effective methods for family planning and the preservation of health of married persons in order to discourage illicit intercourse. "Surely, this is to burn the house to roast the pig." In *Butler* vs. *Michigan*, 352 U. S. 380, this court held unconstitutional a statute proscribing the sale of printed matter, pictures, etc., "containing obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions tending to incite minors to violent or depraved or immoral acts manifestly tending to the corruption of the morals of youth. . . ."

Although it was conceded that the state might enact legislation to protect children against immoral influences, the sweep of the statute was too broad. It prevented the sale to adults of such publications, although they might not have had a deleterious effect on them. "We have before us," wrote Mr. Justice Frankfurter for a unanimous Court, "legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual now enshrined in the due process clause of the Fourteenth Amendment, that history has attested

as the indispensable conditions for the maintenance and progress of a free society."

It would seem impossible to distinguish the *Butler* case from the situation presented here. In order to discourage illicit sexual relations, spouses are prohibited from planning their families in accordance with their economic conditions and consistent with their physical, psychological and emotional welfare; women are subjected to the hazard of loss of life and health; physicians are prevented from practicing their profession in accordance with approved scientific principles; and clergymen are prohibited from the free practice of their religion. Surely this is an arbitrary curtailment of "those liberties of the individual now enshrined in the due process clause of the Fourteenth Amendment."

Restriction of constitutionally protected rights will not be tolerated when the objective sought by the legislature can be attained by other reasonable means. *Schneider vs. New Jersey*, 308 U. S. 147.

POINT IV

The hardship on appellants Doe and Poes and the injurious social consequences of these laws so far outweigh any fancied or real benefits as to constitute an invasion of life, liberty and property without due process of law.

To determine the constitutionality of measures restricting the personal liberty of the citizen this Court has approved the practice of weighing the supposed evils against which the law is directed, against the hardship on the individual and any adverse social effects which may be expected—in other words, balancing the advantages against the disadvantages likely to result therefrom.

A

What are the advantages? What are the evils which the law is calculated to avert?

1. *Prevention of illicit sexual behavior.*

It is said that the law will tend to prevent illicit relations; that the free utilization of contraceptives will tend to encourage promiscuity. This argument fails because the law does not prevent the sale or use of devices for the prevention of disease. See Point II, *supra*.

2. *Prevention of "immoral" sexual intercourse between spouses.*

It may also be argued that there is something immoral about a man and his wife having sexual intercourse for any purpose in mind other than procreation. Connecticut has a sterilization law[10] as well as the absolute prohibition upon the use of contraceptives. "The two such statutes may be reconciled by a distinction between a contraceptive technique which prevents presumably defective offspring and one which prevents merely those which are undesired by the parties to the sex act. It must be noted that such a distinction could not be based on the proposition that the use of contraceptives is immoral in an absolute sense because wicked or against nature, but solely on the ground that the interests of the state require the unrestricted propagation of all healthy persons engaging in sexual relations."[11] But it is the judgment of competent scientists, based on facts revealed by objective research, that the effective limitation of births all over the world (of which Connecticut is a part) is not only desirable for the health and welfare of individuals but necessary to the survival of the human race. See Point IV, B, 5, *infra*.

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[10]General Statutes of Connecticut, Sec. 17-19, Revision of 1958.
[11]6 *U. of Chi. L. Rev.* pp. 260, 266 (1939).

There is, in fact, nothing in the legislative history nor in the judicial interpretation of the Connecticut statutes to suggest that limitation on the birth of children to married persons is immoral. On the contrary, the fact that use of the rhythm method is not banned, that sterilization[12] and abortion[13] are authorized when medically indicated negative any such interpretation.

But even if it be conceded that the legislature did conclude that intercourse between spouses for the sole purpose of expressing mutual love and affection or that the use of contraceptive devices for some other reason was immoral, it is submitted that the conclusion is constitutionally untenable. Unless morality is to be determined by *a priori* reasoning from preconceived premises, there must be some kind of pragmatic test by which presumed legislative findings are to be appraised. Surely the Constitution, conceived for the guidance and protection of human beings, is not to be interpreted in a vacuum.

This Court has laid down the standard for determining the morality of human behavior in the opinion by Mr. Justice Brennan in *Roth* vs. *United States*, 354 U. S. 476. The obscene character of a publication is to be determined by its appeal to prurient interest, applying "contemporary community standards." The publication or distribution of obscene matter is one form of immoral behavior. No reason is to be perceived why a different standard should be applied as a test for other immoral practices. Indeed, Mr. Justice Holmes anticipated such a test 48 years ago in *Noble State Bank* vs. *Haskell*, 219 U. S. 104, 111: "It [the police power] may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare." If this standard is applied to the practices of contraception proscribed by the Connecticut statutes, it will be seen

[12]General Statutes of Connecticut, Sec. 17-19, Revision of 1958. See also Sec. 53-33.

[13]Sec. 53-29.

that the overwhelming majority of the community regards them as desirable, decent and moral. Indeed, substantial segments in our society regard them not only consistent with the highest standards of morality but as required by religious faith.

In a recent survey by Freedman, Whelpton and Campbell[14] all population groups "accept the idea of couples deliberately regulating the number and spacing of their children in relation to their needs and resources." Less than 5 per cent expressed unqualified disapproval. Even among Roman Catholic wives only 13 per cent avowed such sentiments. "In our sample," they said (*ibid.* 52) "83 per cent of the fecund couples (those who find that they can have children easily) had adopted contraception; 7 per cent more planned to do so after having one or more children they still wanted. We think that the proportion may actually exceed 90 per cent, because many couples who are indifferent or opposed to contraception in early married life adopt some method when confronted with a rapidly growing family." As to unqualified approval by religious groups, the authors conclude that "most Protestants and a great majority of Jews but a minority of Catholics" take such a position (*ibid.* 54). The Catholic minority, however, was substantial (33 per cent) and the Protestant majority definite (73 per cent).

The results of a recent Gallup poll disclosed that 72 per cent of the persons interviewed believed that contraceptive advice should be available to all who desired it; 14 per cent had no opinion; 14 per cent believed otherwise.[15]

In a survey by the *Harvard Crimson* of Harvard and Radcliffe students, the results showed that only 7 per cent disapproved birth control (no qualification appeared in the question).[16]

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[14] *Scientific American*, April, 1959, pp. 50 ff.

[15] New York *Herald Tribune*, Feb. 18, 1960.

[16] *The Harvard Crimson*, Sept. 5, 1959, p. 17.

The Royal Commission on Population estimated that whereas only 15% of fecund couples before 1910 practiced birth control, between 1940 and 1947 the proportion had risen to 55% and that ultimately the proportion would exceed 70%.[17]

"The more education the wife or husband has, the more likely it is that the couple has used contraception, that they began early in marriage, and that they have planned their pregnancies and avoided more than they wanted. * * * Among fecund couples with wives 35-39, the use of contraception is almost universal if the wives had more than a grade school education—91 to 97 per cent are users. If the wives had only a grade school education, a sizable majority—78 per cent—are users."[18] "The use of appliance methods is very extensive. Approximately 70 per cent of all users have tried such methods."[19]

"But the procreation of children is not the only purpose of marriage. Husbands and wives owe to each other and to the depth and stability of their families the duty to express, in sexual intercourse, the love which they bear and mean to bear to each other. Sexual intercourse is not by any means the only language of earthly love, but it is, in its full and right use, the most intimate and the most revealing; it has the depth of communication signified by the Biblical word so often used for it, 'knowledge'; it is a giving and receiving in the unity of two free spirits which is in itself good (within the marriage bond) and mediates good to those who share it. Therefore it is utterly wrong to urge that, unless children are specifically desired, sexual intercourse is of the nature of sin. It is also wrong to say that

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[17] *Papers of the Royal Commission on Population*, Vol. I, pp. 7-8 (1949).

[18] Freedman, Whelpton and Campbell, *Family Planning, Sterility and Population Growth*, p. 115 (1959).

[19] *Ibid.*, p. 179.

such intercourse ought not to be engaged in except with the willing intention to procreate children."[20]

The Archbishop of Canterbury was quoted recently as follows: "The Church of Rome allows to its members only two kinds of restraint—abstinence and the 'safe period'. * * * But there are other methods, and Christians have every right to consider them and decide how far, in their judgment it is legitimate and seemly to employ them."[21]

The 171st General Assembly of the United Presbyterian Church of the U.S.A. held in June, 1959, in Indianapolis adopted a resolution declaring that the "sexual life" of a christian marriage is "given by God for the benefit of his children and is neither an ethical neutral aspect of human existence nor an evil which needs to be justified by something else, as for example, by the procreation of children."[22] The resolution further declared that the proper use of "medically approved contraceptives may contribute to the spiritual, emotional and economic welfare of the family."

At its 95th Synod in Los Angeles, 1954, the Augustana Lutheran Church unanimously adopted the following resolution:[23]

> "The means which a married pair uses to determine the number and spacing of the births of their children are a matter for them to decide with their own conscience, on the basis of competent medical advice and in a sense of accountability to God."

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[20]Report of the Committee on the Family in Contemporary Society, *The Lambeth Conference*, p. 2.147 (1958) and quoted with approval by the *Mansfield Conference* of the World Council of Churches, April 12-15, 1958, Sec. 23. See New York *Times*, Oct. 7, 1959 and Fagley, *The Population Explosion and Christian Responsibility*, p. 233 (1960).

[21]*Newsweek*, April 4, 1960, p. 72.

[22]*Time Magazine*, June 8, 1959.

[23]*Report of the Ninety-Fifth Synod.* D. Vernon Swanson, ed. Rock Island, pp. 229-232 (1954).

"So long as it causes no harm to those involved, either immediately or over an extended period, none of the methods for controlling the number and spacing of the birth of children has any special moral merit or demerit."

On April 27, 1960, the Clergymen's Advisory Committee of the Planned Parenthood of America, consisting of prominent Protestants and Jews, released a policy statement, in part, as follows:[24]

"Mindful of Constitutional guarantees of religious freedom, we claim every right to the implementation of our beliefs concerning contraception. And we suggest that our view and the opposing one need not continue to collide if three prerequisites are recognized: 1. All programs of contraceptive information, service and research should exempt from participation anyone with ethical objections. 2. Conversely, the objections of some must not be permitted to deprive others of contraceptive assistance which is scientifically authoritative, and which may be required of them when in conscience they believe birth control fulfills the will of God. 3. Physicians, research scientists, clergy, social workers and others connected with such programs must be guaranteed full freedom to exercise their professional skills and responsibility.

"We wish to add one comment in a broader context. God has given us a responsibility toward the earth and ourselves. We are charged to protect and nourish human life. So must we care for the earth and its riches—develop but not exploit.

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[24] New York *Times*, April 27, 1960.

This committee included many of the nation's leading religious leaders among the Protestant and Jewish faiths. Some members: The Rt. Rev. James A. Pike; Dr. Harry Emerson Fosdick; Rabbi Edward Klein; Rev. Dr. Bromley Oxnam; Dr. Clarence E. Pickett; Dr. Reinhold Niebuhr; Rabbi Maurice N. Eisendrath; Dr. Norman Vincent Peale; Dr. Henry P. Van Dusen; Dr. Walter G. Muelder; Rabbi David H. Wice. See, in general on the Protestant position, St. Johns-Stevas, *Birth Control and Public Policy*, p. 39 (1960).

> conserve and not plunder. If the proliferation of humanity creates such an imbalance between numbers of people and resources available to support them that man is left wretched and weak, and the earth is gutted of its wealth beyond replenishment, then we shall have nullified our responsibility, denied God's destiny for us, and failed in our high calling under Him."

The Royal Commission on Population reported in 1949 that "We have received no evidence from any quarter to the effect that family-planning or, as it has been called, voluntary parenthood, is regarded as improper or that a married woman should conceive as often as 'nature' determines. The only evidence on which a doubt on this point might arise is that of representatives of the Roman Catholic Church. . . ."[25]

Although the theological position of the Roman Catholic Church prohibits the practice of contraception by "artificial" means to members of the faith, there is eminent Catholic authority that it is morally wrong to enforce by law this dogma upon persons whose religious and ethical convictions are the other way. Thus, Vernon J. Bourke, a distinguished philosopher has recently written:[26]

> "Are Catholics, living as citizens of a democratic country, justified in seeking government restraint of the dissemination of information on birth-control practices? Before examining this, let us remember that we are talking about a pluralistic society, a society in which there are diverse views on the moral value of birth-control data . . .
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> "Remembering that these conflicts arise because of varying notions of what is morally acceptable, I think we may say three things about them. First, each minority group

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[25] *Report of the Royal Commission on Population*, p. 158 (1949).

[26] "Moral Problems in Censoring," 40 *Marquette L. Rev.* 57, 68 (1956). See also John Courtney Murray, in *Religion in America* (John Cogley, ed.) pp. 32-33 (1959).

has a right, even within a large pluralistic society, to censor *for its own members* the use of media seriously considered harmful for that group. Secondly, one minority group in a pluralistic society does not have a moral right to demand government censoring of the expression of the foregoing sort of information *for members of other groups*, who do not share the same standards . . . ." (Emphasis are the original)

If morally wrong, it is difficult to sustain the validity of these laws as reasonable restrictions upon personal liberty.

An influential Catholic publication, on June 16, 1960, stated editorially:[27]

"* * * Undoubtedly, many non-Catholics believe that they can make use of contraceptive devices without violating any divine law. Moreover, many such persons feel *a positive obligation* to prevent conception of offspring for one reason or another. Obviously, then, laws such as the Connecticut law under discussion try to prevent such persons from acting in a way which their consciences either permit or prescribe.

"We would not say that the state never can pass laws such as this, but that it can be done only for the gravest of reasons and when the acts outlawed are manifestly against the common good. Error has no rights, it is true, but persons—or consciences—in error do.

"*From these considerations, we feel that a Catholic can justifiably favor repeal of the Connecticut and Massachusetts anticontraceptive laws, or breathe happily if they are declared unconstitutional.* . . ." (Emphasis added)

As against these supposed purposes of this legislation the following factors should be balanced:

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[27] *Ave Maria*, weekly organ of the Congregation of the Holy Cross, p. 16.

B.

Harm to Individual and Society.

1. *Invasion of Privacy and the Evils of Abstinence.*

This law is a colossal irrelevancy to any proper concern of the legislature of the State of Connecticut. When the long arm of the law reaches into the bedroom and regulates the most sacred relations between a man and his wife, it is going too far. There must be a limit to the extent to which the moral scruples, of a substantial minority or, for that matter, of a majority, can be enacted into laws which regulate the private sex life of all married people.

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of those persons to participate in the ceremony does not interfere with or deny rights of others to do so.
>
> . . . The sole conflict is between authority and rights of the individual." Mr. Justice Jackson in *Board of Education* vs. *Barnette*, 319 U. S. 624, 630. *Cf. Public Utilities Comm.* vs. *Pollak*, 343 U. S. 451.

So, too, in the present dispute, the challenged statutes prohibit practices performed in the privacy of the home which affect no person except the spouses who freely indulge them. Those who do not believe in the use of contraceptives are free to follow their conscience and their beliefs. All that is claimed here is the equal right of those who believe otherwise. These spouses want to be let alone in the bedroom. "The right to be let alone," said Mr. Justice Brandeis, "is the most comprehensive of rights and the one most valued by civilized men." (Dissenting in *Olmstead* vs. *United States*, 277 U. S. 438, 478). The notion that a man's home is his castle goes back several centuries in the history of Anglo-American culture. The King may not breach those walls save by judicial approval. If the legislature may prescribe, censor or regulate marital intercourse, what is there left

of the "castle"? These married appellants claim a constitutionally protected right to marital intercourse in the privacy of their homes, by mutual agreement, under medically approved conditions.

For centuries in our law, there has been a "right" to consortium. The common law protects it against invasion by third persons. The question here is, when may the state restrict and limit a "right" prized for centuries so highly and "one most valued by civilized men"? It would seem clear that a justification far more cogent than that inferred from the record in these cases is required by the Fourteenth Amendment.

The harmful effects of abstinence on the individual. It is argued that if spouses do not want or should not have children they should abstain from intercourse. Seventeen years ago, Dr. Karl Menninger wrote: "Clinical experience brings us as psychiatrists to the very definite conclusion that while in the lower animals sexual pleasure is primarily a means to an end, in human beings it is not only a means to an end but also a very important end in itself. With a much more elaborate central nervous system and a far more complicated social environment, the human being no longer reacts as animals do in a simple reflex way to the sensory indications of a reproductive opportunity. The impulse for sexual union travels a long complicated path and becomes entwined as Havelock Ellis says, with all the highest and subtlest human emotions and activities. . . . The thwarting of this means the interference with the harmony of human affection which law, religion and social custom are at such pains to nurture." To the objection that there exist fine and healthy people who are celibate, Menninger answers: "Strictly speaking, [it] is true, but in its inference it is untrue and I regard it as intellectually dishonest to continue to use it to foster hypocrisy, false attitudes and neuroses. Solitary confinement is not *physically* harmful either, but it is harmful to the personality in other respects and everyone knows it, and the same is true of complete continence in the adult, male or female. . . . . Denied [out-

let of sex], the suppressed energies become diffused, distorted, and capable of pathological expression."[28]

Otto Fenichel, writing in 1945,[29] mentions as among the causes of sudden aggravations of neuroses "external frustrations or blockings of instinctual satisfactions hitherto obtainable." He says: "Any frustration in the realm of adult sexuality increases the intensity of the unconscious infantile sexual longings." He quotes Reich as pointing out "that during sexual excitement typical autonomic nervous reactions occur. In normal sexual intercourse these autonomic cathexes become gradually transformed into genital ones, and find a genital outlet in orgasm. If the orgastic function is disturbed, this change does not take place. The autonomic system remains over-charged, and this fact produces anxiety."[30]

Karen Horney discusses sexual activity as relieving neurotic tensions: "How well sexual abstinence may be endured varies with the culture and the individual. In the individual it may depend on several psychic and physical factors. It is easy to understand, however, that an individual who needs sexuality as an outlet for the sake of allaying anxiety will be particularly incapable of enduring any abstinence, even of short duration."[31]

"Suppression of the coital urge directed towards his wife is possible for the intelligent considerate husband aware of a good reason why she should not become pregnant. But the urge is still there, and unless, by appropriate and effective taboos, it can be sublimated into a sexual martyrdom of which few Americans, including all colors and creeds, are capable, it will express itself in any one of the innumerable aberrancies of the primate sex function. . . . To demand prolonged continence as the

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[28]"Psychiatric Aspects of Contraception," *Bulletin of the Menninger Clinic*, Vol. 7, p. 36 (1943).

[29]*The Psychoanalytic Theory of Neuroses*, p. 455 (1945).

[30]*Ibid.*, pp. 187-188.

[31]*The Neurotic Personality of our Times*, pp. 158-159 (1937).

only method of contraception from anyone who is not stoutly bulwarked by the strongest spiritual sanction is to drive that individual to what society has judged criminal, and which, if practiced by any number of those who should prevent pregnancy for shorter or longer periods, for reasons which have been stated, would disrupt our whole moral order."[32]

The Kronhausens, in their recent study of obscenity, say: "* * *. All the clinical evidence indicates that guilt based sexual inhibitions, restrictions and repressions result in perversions of the sexual impulse, general intellectual dulling, sado-masochistic inclinations, unreasonable (paranoid) suspicions, and a long list of neurotic and psychotic defense reactions with unmistakable sexual content and overtones."[33]

The harmful effect of abstinence on family life. Great emphasis is placed, in our culture, on the importance of stable family life. Divorce, broken families, "part-time" parents constitute a serious menace to the social order and to the mental health of the nation. It would appear that any law which jeopardizes family solidarity has a negligible claim to the promotion of the public welfare. Competent scholars point out that freedom of the bedroom is an essential factor in satisfactory marital adjustment.

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[32]Rock, "The Scientific Case Against Rigid Legal Restrictions on Medical Birth-Control Advice," *Clinics*, April, 1943, pp. 1609, 1610.

In a large number of African societies there is a taboo on sexual relations between the mother and father during pregnancy and the nursing period following birth which, in many instances may be prolonged for several years. But in these societies polygyny is accepted as a normal way of life. It seems clear that the long period of abstinence by the father from the mother of his child is a mainstay of the system of plural wives as well as a biological basis for the health of the mother. But such a system obviously would collide with the mores and moral values of our society. See, e.g., Simmons, "Sexual Life, Marriage and Birth Among the Efik," *Africa*, Vol. XXX, No. 2, pp. 153, 157 (April, 1960); Fagley, *The Population Explosion and Christian Responsibility*, pp. 87-88 (1960).

[33]*Pornography and the Law*, p. 267 (1959).

"Normally sexed individuals, living in the intimate daily contacts of married life, find it very difficult to abstain completely from marital relations. Only people who have an unusually high degree of control over their desires, or what is more generally the case, those who have a very low degree of sexual drive are able to refrain from sexual contact with their mates for long periods of time."[34] Moreover, "prolonged continence in married life is physiologically and psychologically undesirable. When two people who love each other and live together in the close intimacies of marriage attempt to avoid sexual relations, it inevitably gives rise to marked physical stresses and emotional strains, which are very likely to lead to serious physical and sexual disharmonies and marital conflicts. A satisfactory sex life is essential for a satisfactory marital union, and not many marriages can long survive the complete repression of the sexual instinct."[35]

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[34]Stone, Hannah and Abraham, *A Marriage Manual*, p. 106 (1953).

[35]That these emotional problems associated with sexual maladjustments and worries about parenthood are the basic causes of many broken families is accepted by many competent scholars. McCormick "Another Field of Preventive Medicine," *Journal of the Indiana State Medical Association*, Vol. 4, March, 1956. pp. 284-6, at 285: "Of the four major causes of divorce, sex, finances, liquor and in-laws, sex is by far the predominating factor, being involved in fully two-thirds of all divorces."

Stokes, *Modern Pattern for Marriage*, p. 23 (1948): "But in our time through recent advances in the control of conception we have won a new freedom of sexual pleasure in marriage. It is entirely beneficial and desirable that married people of our day may, under medical advice, discard the conception worries of their immediate ancestors and enjoy their most intimate relationship with spontaneous, natural freedom, subject to no concern other than the employment of a simple contraceptive technic that is merely a small addition to the wife's routine of personal hygiene."

Schölten, "The Premarital Examination," *Journal of the American Medical Association*, Vol. 168, Nov. 1, 1958, pp. 1171-7, at p. 1172: "While not all divorces or unhappy marriages arise from a sexual basis, a surprisingly high percentage do have their origin in some disagreement at that level."

These facts have been recognized in the law for centuries. As early as 1681 we find it written:[36] "So then, it is not the consent of marriage, as it relateth to the procreation of children that is requisite, for it may consist, though the woman-be far beyond that date; but it is the consent whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution of marriage, is the solace and satisfaction of man." The above passage was quoted by Viscount Jowitt, L.C., in *Baxter* vs. *Baxter*, (1948) A.C. 274, 289 with the concluding comment: "I am content to adopt these words as my own."[37] So too, are these appellants.

"The connexion between husband and wife, constitutes the most important, and endearing relation, that subsists between individuals of the human race. This union, when founded on a mutual attachment, and the ardor of youthful passions, is productive of the purest joys and tenderest transports that gladden the heart."[38]

The psychological and emotional interactions of sexual responses are phenomena of special significance in the building of solid family relationships. Sex is certainly not the simple or isolated factor it is sometimes thought to be. Sexual responses are broad and variable. Although there are few scientists today who would claim that sex is invariably the sole determinant of satisfactory adjustments of spouses, there is no school of the behavioral sciences which denies that sex is an important factor in domestic discord.[39]

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[36]Lord Stairs' *Institutions*, Book I, Title 4, par. 6.

[37]In the *Baxter* case a husband sought the annulment of a marriage on the grounds that it had never been consummated. The wife, determined not to have children, had never permitted intercourse to her husband unless he used a condom or sheath. The House of Lords refused to annul the marriage, holding that the procreation of children was not the "principal end" of marriage and that this marriage had been consummated.

[38]Swift's *System of the Laws*, Vol. 1, at page 183 (1795).

[39]See general discussion in Young: *Personality and Problems of Adjustment*, Ch. 17.

2. *The problems of the unwanted child.* Karl Menninger makes much of this.[40]

> "Far more important than the dramatic examples in which the hostility of a mother ruins the life of an unwanted child, are the more general effects of repressed maternal hatred. Where one child reacts to this with an acute mental illness, dozens of children react to it in more subtle ways by developing self-protective barriers against the inner perception of being unwanted. This may show itself in a determined campaign or in a provocative program of attracting attention by offensive behavior and even criminal acts. Still more seriously it may show itself as a constant fear of other people or as a bitter prejudice against individuals or groups through deep-seated, easily evoked hatred for them. The rage of the southern poor white against the Negro suspected of some dereliction is referable to the hate he feels inwardly at having been himself, like the Negro, unwanted. The same is perhaps true in the case of Germans and Jews and in many other situations which give opportunity for the expression of hatred in the denial of the feeling of being rejected. The importance of this factor in the psychology of war is even greater, in my opinion, than the economic factor arising from the increase of population. This is why I say that from the purely scientific point of view, *planned parenthood is an essential element in any program for increased mental health and for human peace and happiness.* The unwanted child becomes the undesirable citizen, the willing cannon-fodder for wars of hate and prejudice. . . ."[41] (Emphasis added)

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[40] *Love Against Hate*, p. 224 (1942).

[41] In Dr. Rainwater's recent book, he recalls the pathetic lament of a thirty-four year old "lower-lower class" woman pregnant with an unwanted fourth child: "I think the amount of children you want is important. I don't think anyone should have more than they really want because they feel kind of hard toward the babies I think, and that's not fair." *And the Poor Get Children*, p. 49 (1960).

Freedman, Whelpton and Campbell found that of the 2,713 married women interviewed, 16 per cent of the most recent pregnancies were unwanted by the wife, husband or both.[42]

"Blessed are the little children" is a beautiful sentiment. As a sociological proposition in today's world it is often a figure of speech and should not be mistaken for a fact. Some children are blessed indeed, but the unwanted child is not one of them.

3. *Planning a healthy family.* Although this Court has declared that the term "liberty" includes, among other things, "the right of individuals to acquire useful knowledge, marry, establish a home and bring up children" *Meyer* vs. *Nebraska*, 262 U. S. 390, 400, many young couples can plan neither their families nor their lives in the face of these Connecticut laws. Consider, for example, a student in a professional school, and his wife a graduate student in the university.[43] They are largely supported by his salary as a part-time instructor in the undergraduate school. They desire to plan their children both as to time and number. A pregnancy at this time would disrupt the wife's education and seriously increase the economic problems of the couple who desire to limit their children to the point where they can give them the advantages of a good home and a good education. Moreover, they are convinced that spacing of their children is essential to the health of the wife. The Gutmacher poll of 3,381 doctors indicated the minimum safe interval, so far as the mother's health,

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See also Coghill, "Emotional Maladjustments from Unplanned Parenthood," *Virginia Medical Monthly*, Vol. 68, p. 682 (1941). Jenkins, "The Significance of Maternal Rejection at Pregnancy for the Future Development of the Child," in Rosen, *Therapeutic Abortion*, p. 269 (1954).

[42] *Family Planning, Sterility and Population Growth*, p. 75, (1959).

[43] The bulletins of Yale University disclose that during the academic year 1958-59, there were 1,372 graduate and professional married students enrolled.

was concerned was twenty-three months between children. This was the average. The following table summarizes the results:[45]

Replies to the Question Concerning the Desirable Interval between the Termination of One Pregnancy and the Beginning of the Next after a Viable Birth

Average Interval	Number of Respondents	Per Cent
Any time	6	0.2
1-3 months	129	3.8
4-6 months	295	8.7
7-9 months	197	5.8
10-12 months	885	26.2
13-18 months	714	21.1
19-24 months	699	20.7
25-36 months	111	3.3
37-48 months	5	0.1
49 months and over	1	0.0
Don't know	23	0.7
Not stated	216	6.3
Total	3,281	99.3

The Connecticut statutes here in question deprive such young people of the liberty assured to them by the 14th Amendment of the Constitution of the United States. Certainly that renascence of ideas which brought a recognition of the importance of the individual should afford protection to young married couples in the management of their family affairs within the framework of the marital relation as it is known in the Christian and Judaic culture of the Western World. It would seem clear that if state legislation made it a criminal offense for any married couple to have, say, more than two children, this Court would strike it down as interfering with rights so deeply rooted in our mores as to be a denial of due process. It is submitted that legislation which prohibits a married couple from limiting the number of their chil-

[45] *Human Fertility*, Vol. 12, No. 1 (March 1947).

dren by the most effective, scientifically approved methods, is no less an invasion of liberty which is intolerable.[45]

It may, indeed, be true that if present population trends continue (see Point IV, B, 5(b)) our society may, for mere survival, be compelled to find constitutional means to restrict the number of births by the most effective means possible. One way calculated to bring about such a tragic situation is to prohibit by law voluntary limitation on the birth of children.

4. *The abortion problem.* It is argued that these laws can be justified as in the interest of public morality. The best scientific opinion is that they contribute to public immorality by the creation of situations leading to illegal abortion. Here again, there is no substantial relation between this legislation and the desired ends. It encourages more evil than it averts.

Because of the absence of satisfactory studies of the subject, a recent conference on abortion in the United States, held at Arden House under the auspices of the Planned Parenthood Federation, was unable to reach any clear conclusion as to the relationship of birth control education to abortion. Many of the experts present, however, felt that their clinical observations justified an impression that the abortion rate could be substantially reduced by more widespread use of contraception. The final statement of the conference on this question was: "It was

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[45] "'Birth by decree!' From a moral point, I think that legislation against the manufacture and sale of contraceptives is just that. I do not think that, as a body-politic, we have the right to force any human being to beat and rear a child against her will. It is an appalling violation of personal dignity and the integrity of the human spirit. * * *" Frohman, 31 *N. Y. U. L. Rev.* 1214, 1216-1217 (1956).

"* * * it would seem that the freedom of sex relations within marriage and the freedom to have children when wanted rank high among the basic personal liberties in our society and their curtailment presents a serious civil liberties issue." Kalven, "A Special Corner of Civil Liberties," 31 *N. Y. U. L. Rev.* 1222, 1228-1229 (1956).

recognized by the Conference participants that no scientific evidence has been developed to support the claim that increased availability of contraceptive services will *clearly* result in a decreased illegal abortion rate. The absence of such evidence, however, does not rule out the theoretical likelihood that it does. Therefore, it would be a constructive step if facilities for obtaining advice on contraception should be extended under medical supervision, to make such advice freely available to all who desire it."[46]

Some more positive statements of opinion on the subject: Dr. Sophia J. Kleegman, Clinical Professor of Obstetrics and Gynecology, N.Y.U. College of Medicine: "Education in conception control, during the premarital and postpartum medical examination, is the most effective step to be advocated for preventing both therapeutic and criminal abortion. . . . Modern methods of family planning, it should be emphasized, would prevent 90-95% of all abortion deaths."[47] Dr. Kleegman also says: "For many years, whenever I was on service, I have interviewed every patient who had a therapeutic abortion. Most of them had been under the care of some health or welfare agency for years. Only one of these had ever been referred to a contraceptive clinic by a social worker. I know, in my private practice, when patients have this medical care when needed, there is a definite reduction in the number of legal or illegal abortions subsequently sought and received." She says that in her private practice she often persuades patients not to seek illegal abortions, promising them birth control instruction later to prevent further unwanted pregnancies. "It is this promise that is the greatest help in persuading many a woman to continue a pregnancy that she would not otherwise carry on."[48]

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[46]Calderone, *Abortion in the United States*, p. 182 (1958).

[47]Kleegman, "Planned Parenthood: Its Influence on Public Health and Family Welfare," in Rosen, *Therapeutic Abortion*, pp. 254, 255 (1954).

[48]Calderone, *op. cit.*, note 46, pp. 111-113.

The late Dr. Abraham Stone, one time Vice-President, Planned Parenthood Federation of America: "I believe that there is a high correlation between the lack of use of contraception and the high incidence of abortion: the more contraception is used, the less abortion there will be. While I do not have the figures here, I know from the more than 140,000 couples that have come to the Margaret Sanger Research Bureau that those who have come early in marriage and obtained competent contraceptive information have had definitely fewer abortions than those who have not used any contraceptive measures at all."[49]

Abortion is widespread in the United States. While there are no good statistics because most abortions must be done secretly outside the law, all agree that abortion presents one of the major medical and social problems in the United States. The Arden House Conference Statement said that it presented a problem in epidemiology "as real and as urgent as did venereal disease three decades ago."[50]

Statistical estimates of the prevalence of abortion in the United States vary greatly. The most startling figures are those of the Institute for Sex Research, reported by Tietze and Martin, who, in a study of 2,723 pregnancies of 1,329 women, found 708 induced abortions (20% of all pregnancies). 93% of these abortions were illegally performed. The authors recognize the limits of their sample, which included only urban, white, generally well-educated women, 15% from the northeastern states, and contained a larger proportion of single women than exist in the population at large. Allowing for the disproportion of single women, they estimate that a valid figure for abortions among *comparable segments* of the population would be 20 to 25% of all pregnancies.[51]

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[49] *Ibid.*, p. 159.

[50] *Ibid.*, p. 181.

[51] Tietze and Martin, "Foetal Deaths, Spontaneous and Induced in the Urban White Population of the United States," *Population Studies*, Vol. XI, No. 2, p. 170, 174 (1957).

In a recent study of 5,000 women, Gebhard, Pomeroy, Martin and Christensen found that among the married women of the group 23% of the pregnancies were terminated because of an induced abortion and among the single women 86% were so terminated. In the entire series, all but 6.8% were criminal abortions.[52]

The report of the Statistical Committee of the Arden House Conference concluded:

"Taking into account the probable trend of the abortion ratio since the interwar period, a plausible estimate of the frequency of induced abortion in the United States could be as low as 200,000 and as high as 1,200,000 per year, depending upon assumptions made as to the incidence of abortion in the total population as compared with the restricted groups for which statistical data are available, and upon the assessment of the direction and magnitude of bias inherent in each series of data. There is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency."[53]

It was agreed that a large proportion of abortions are performed on married women, but statistics again are poor. Kinsey reported that 22% of his sample who had been married had had at least one abortion by the age of 45.[54] (This sample was not identical with the Institute of Sex Research sample discussed above, but similarly included only white women, mostly urban and well-educated.) Kleegman thought that nine-tenths of the criminal abortions in the United States "occur among married women with three or more children."[55] A study reported in the British Medical Journal found 88% of abortions to have been performed

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[52] *Pregnancy, Birth and Abortion*, pp. 54, 93-94, 119, 196 (1958).

[53] Calderone, *op. cit.*, note 46, p. 180.

[54] *Ibid.*, p. 54.

[55] Rosen *op. cit.*, note 47 p. 255.

on married women.[56] Whelpton found a correlation between illegal abortions and the number of previous pregnancies.[57]

Dr. Kleegman quoted Commonwealth Fund statistics as showing deaths from abortion as being highest in the age group between 35 and 39, and "most common among women in their seventh pregnancy, and in descending order of frequency, among women in their sixth and fourth pregnancies."[58]

Because women, who often feel desperately that they must have an abortion, are unable to get it through legitimate medical channels, the bulk of abortions are brought about illegally. During the period between 1950 and 1955, during which time 77 therapeutic abortions were performed in Bellevue Hospital, 3,488 cases of abortion (spontaneous as well as induced) were admitted for care. Of these Dr. Kleegman estimated one-half, or over seventeen hundred, were induced. Even this number, she feels, represents only a fraction of the induced abortions in the population served by Bellevue. "Most of the abortions occurring in the population do not come to the hospital at all. Many of these in early stages of pregnancy do not even seek medical care."[59]

Many women try to induce their own abortions, and may cause themselves great injury in so doing. At the Arden House Conference Dr. Helpern, Chief Medical Examiner in New York City, reported: "We see a number of deaths due to self-induced abortions, some of these involving insertion of various objects, medicinal substances, or injection of fluid into the uterus, or the insertion of corrosive chemicals."[60] Dr. Hellman said: "I am sure

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[56]Reported in Williams, *The Sanctity of Life and the Criminal Law*, footnote, p. 211 (1957).

[57]Whelpton, The Abortion Problem: *Proceedings* of the Conference Held Under the Auspices of the National Committee on Maternal Health (1942), as quoted by Williams, *op. cit.*, footnote no. 2, p. 211.

[58]Rosen, *op. cit.*, note 47, p. 255.

[59]Calderone, *op. cit.*, note 46, pp. 109-110.

[60]*Ibid.*, p. 64.

that those of you who deal with large numbers of patients realize that there are styles in inducing abortions just as there are styles in women's clothes, and we happen to be in the midst of one kind of tablet. Why people should feel that these little tablets induce abortions, I don't know. Although they only cost around ten cents, they are sold to women from a dollar to five dollars per tablet. They are highly poisonous, and when inserted, they produce bleeding and ulceration, sometimes severe hemorrhage, but never abortion."[61] Dr. Hellman reported that in a group of 70 abortions which his hospital found suspicious enough to report to the authorities, three-quarters or more were self-induced.[62] The Sub-Committee on Maternal Welfare of the District of Columbia Medical Society found in a study of deaths from septic abortions in the District that the majority were due to self-induced abortion.[63]

A study of the files of the Kings County Grand Jury in New York is instructive. Bates[64] described "abortion mills" where one or more operators conduct a steady practice of abortions, and "abortion rings" might involve a number of abortionists or mills in a fairly complex organization. Of these the "mills" are the most common. An abortion "mill" usually includes, besides the abortionist, a secretary-receptionist, a business manager who handles relations with the landlord, the police, and persons referring patients; also an assistant who acts as nurse, but is seldom a registered nurse.

Referrals to physician-abortionists usually come through doctors and druggists, but in some cases through former patients and others, such as bell-boys and taxi-drivers, often on a fee-splitting basis.

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[61] *Ibid.*, p. 64.
[62] *Ibid.*, p. 65.
[63] *Ibid.*, p. 65.
[64] Bates, "The Abortion Mill: An Institutional Study," *Journal of Crim. L., Criminology, and Police Science*, Vol. 45, p. 157 (1954).

5. *Science and human life.* These laws unreasonably prohibit the dissemination of information and practices which (a) are approved by the medical profession and (b) are considered by demographers as vitally important for the welfare and even the existence of human society.

(a) *Medical Science.* We are not dealing here with crackpot ideas or practices advocated by a fanatical minority of doctors. Use of contraceptive devices, made unlawful by the Connecticut statute, are accepted by the medical profession as sound medical practice and is endorsed by an overwhelming number of persons in the United States. In a poll taken by a distinguished physician in 1944, it appeared that 97.8 per cent of American doctors expressed approval of contraception as a medical technique.[65] Over twenty years ago the House of Delegates of the American Medical Association adopted a committee report recommending that medical students "be instructed fully concerning fertility and sterility and taught the clinical considerations and therapeutic application of contraceptive methods."[66]

"Control by men and women over the number of their children is one of the first conditions of their own and their community's welfare, and in our view mechanical and chemical methods of contraception have to be accepted as part of the modern means, however imperfect, by which it can be exercised."[67]

The Ministry of Health since 1930 has authorized contraceptive advice to be given in government maternal and child welfare clinics to married women for whom a pregnancy would be detrimental.[68] Many clinics of the Family Planning Association,

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[65] Guttmacher, "Conception Control and the Medical Profession," *Human Fertility*, March, 1947.

[66] *Journal of the American Medical Association*, Vol. 108, p. 2217 (1937).

[67] *Royal Commission on Population Report*, par. 427 (1949).

[68] *Ministry of Health Memorandum*, No. 153, 1930; *Circular* 1208 (1931); *Circular* 1408 (1934); *Circular* 1622 (1937).

a private agency, are conducted on the premises of the local authority or regional hospital boards. Private practitioners may provide contraceptive advice regardless of the existence of medical reasons.[69]

Progress in medical science generally since the enactment of the Connecticut Birth Control Laws in 1879 is well known. This is no less true of knowledge of the medical profession with respect to contraception. "The growth of science also was one of the influences that tended to loosen the taboos surrounding the function of sex and to change accepted notions of what was 'decent' in discussion and conventional behaviour. The change in outlook and attitude opened the way for the spread of knowledge of the means of controlling conception."[70]

Himes writing in 1936 said: "Recent symposia and recent summaries of questionnaires received from medical school staffs show that medical opinion has been tremendously liberalized in the United States in the past decade or two; that we in the United States are now catching up with medical opinion in Western Europe. The change has been nothing less than revolutionary especially in its rapidity . . . a little more courage and devotion to science and less pure obscurantism will take us a long way. Whether the curve of history will be projected into the future now depends on the physicians and on the kind of support they get from the general public and especially from legislatures."[71]

The evidence set forth herein clearly indicates that physicians in the nation have not been lacking in courage and devotion to science. Nor have they wanted for support from the general public. Unfortunately the "curve of history" does not receive the support of the legislature of Connecticut. But what may have

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[69] *Supplement to the British Medical Journal*, Nov. 6, 1954, p. 166.

[70] *Royal Commission on Population Report*, par. 40 (1949).

[71] *Medical History of Contraception*, p. 424 (1936).

been justified in 1879 on the basis of medical knowledge at that time and public opinion as to immorality and obscenity, may well be, and it is submitted, is unreasonable and intolerable today. The Constitution does not change but the times and scientific knowledge do.

"It is of the very nature of a free society to advance in its standards by what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." Mr. Justice Frankfurter, in *Wolf* vs. *Colorado*, 338 U. S. 25, 27. A free society is not a frozen society. Democracy cannot afford laws which stand still in a world moving as fast as ours. Nor, it is believed, was it so intended by the Founding Fathers. Unrestricted fertility may reasonably have been thought desirable even necessary in 1879. But as Aldous Huxley has aptly said, in 1960 it is one of the highest forms of "cosmic immorality."

It is submitted that a medical practice which is so overwhelmingly endorsed by the profession as in the interest of human beings cannot be held to be contrary to the public welfare or inimical to public morality.

(b) *Science of demography.* Demography is an important phase of science and may eventually be as significant for life and death on this planet as nuclear physics and atomic science. Contraception and its relation to population control is the object of study and the subject of advocacy by the most thoughtful of the world's demographers. Belief in birth control is not the erratic notion of the sadist or the depraved. It is in the mainstream of scientific thought.

Some of the problems involved which make this issue and this branch of thought pertinent: the size of the earth's population now and in future years, the relationship of the population to the earth's resources—the "vital balance," the national security as

well as the economic and social well-being of the people of the United States.

World population. The United Nations Demographic Yearbook for 1956[72] estimated the world's population of 1955 at 2,691,000,000. The latest United Nations Study[73] declares that at the present rate of increase, in 600 years there will be standing room only (40 square inches per person) on this earth, and Buxton and Southam[74] estimates that "if the present rate of population increase is maintained * * * in 5000 years the mass of humanity will exceed the mass of the earth itself." It cannot be presumed that any civilized nation ignores the problem presented by these estimates of some of the world's foremost scientists. It would seem that these estimates are as pertinent to the issues before this Court as they are spectacular and frightening. *Brown* vs. *Board of Education*, 347 U. S. 483.

It is not suggested that this Court concern itself with the problems which may face the world in 5000 years, or, for that matter, in 600 years. Indeed, there may be no nation such as ours in existence on either of these dates. However, it may be thought relevant to give consideration to the problems likely to be faced in the next few decades or even in the next century. Our nation has already existed for almost two centuries, and it may be hoped that it is not soon fated for extinction.

World population is a matter of grave concern to this as well as all other members of the family of nations. The United Nations maintains a Population Division with a large staff engaged in continuous demographic research. The United States does not contribute large sums for such staff activities merely from curiosity.

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[72] P. 151.

[73] *The Future Growth of World Population, Population Studies*, No. 28, p. v (1958).

[74] *Human Infertility*, p. 220 (1958).

Studies indicate the present gain of population of the world (net increase of births over deaths) amounts to about 68 thousand human beings every 24 hours. This works out to around 475 thousand per week, 2 million per month, with a total annual gain of 25 million.[75] A United Nations study of 1951[76] suggested that the world's people will increase by 500,000,000 to 1,200,000,000 by 1980 in the absence of wars or other calamities. On this basis, the world population would be between 2,976,000,000 and 3,636,000,000 by 1980.[77]

But these estimates have been abandoned as too low. A later study of the Population Division of the United Nations now places the estimate for 1985 as 4⅓ billion persons and for the year 2000 as between 6 and 7 billion.[78] In the preface of this publication (p. v) it is said: "The growth of world population during the next twenty-five years, therefore, has an importance which transcends economic and social considerations. It is at the very heart of the problem of existence." It should hardly be necessary to argue that Connecticut laws which contribute ever so slightly to the extermination of humanity are unreasonable and unconstitutional.

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[75]Cook, *Human Fertility*, p. 68 (1951).

[76]*The Past and Future Growth of World Population.*

[77]See *Determinates and Consequences of Population Trends*, Population Studies No. 17, p. 161 (1953).

[78]*Population Study No. 28, supra*, p. 73. In the report of the tenth session of the United Nations Population Commission (Economic and Social Council Official Records, Supplement No. 3) (1959), it is said: "The projections indicate that the earth's population, which is now approximately 2,800 million, will be between 3,600 million and 3,900 million in 1975, and, under the above-mentioned assumptions, might be between 4,900 million and 6,900 million by the year 2000. The rate of increase has gradually risen during the last century and a half, to the point where it is now approximately 1.7 per cent per year. This means that during 1959 and 1960 the number of people in the world will increase by about 100 million. If the medium assumption of the projections should hold true, the rate of population growth in the coming years would continue to rise." (p. 2)

People and food. There are already too many people on the earth. One of the great problems of the future will be to create and maintain the "vital balance" between resources and population. This will be particularly difficult in view of the unequal distribution of natural resources and arable land. At the present time more than half the people of the world are underfed, poorly housed, receive little or no modern medical care, and are inadequately educated.[79]

Our own State Department estimates that only one-third of the people in the world get enough to eat and that one-third of the people eat three-fourths of the world's food supply.[80] The Food and Agricultural Organization estimated in 1951 that the number of people in the world on a diet of less than 2200 calories had doubled since prewar days and that the number receiving more than 2800 calories was 22% less than before the war.[81] It seems pretty clear that the world is running behind in the race for existence.

There is considerable variation in the estimates of the experts as to carrying capacity of the earth. They range from less than 3 billion to 16 billion. East in 1928 arrived at a maximum of 5,200,000,000 on the assumption of 13,000,000,000 of acres of arable land and 2.5 acres as the requirement for one person.[82] On the other hand in 1945, Pearson and Harper concluded that the approximate population which can be supported by grain supplies even on the Asian standard of consumption is 2,831,000,000.[83] On the European standard the number is reduced

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[79] *Population Bulletin*, Vol. 13, No. 1, p. 11 published by Population Reference Bureau, Inc., Washington, D. C.—address by George W. Beadle, retiring President of the American Association for Advancement of Science, 1957.

[80] *Food and People*, Department of State Publications, No. 3736 (1950).

[81] *United Nations Food and Agricultural Statistical Yearbook*, 1951, p. 161.

[82] East, *Mankind at the Cross-Roads*, p. 69 (1923).

[83] *The World's Hunger*, p. 69 (1945).

to 2,127,000,000 and to 902,000,000 on the North American standard."[54]

Dr. Toynbee, in a recent broadcast, stated: "The abolition of war, working in combination with the lowering of the death rate through our recent vast improvements in public hygiene, is going to raise, in an acute form, the problem of population. Is mankind going to rid itself of two of its three traditional scourges—war and pestilence—only to be done to death by the third scourge, famine? . . . When we have done all that science can do to increase the world's food supply, the only way left open to us for coping with the continuing increase in population, through the reduction of the death rate, will be to offset this increase by a corresponding reduction in the birth rate."[55]

In *Skinner* vs. *Oklahoma*, 316 U. S. 535, 541, Mr. Justice Douglas said: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." They are, indeed, and so, too, is the limitation of

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[54] *Ibid.*, p. 69.

[55] Quoted by Dr. Fairfield Osborn in *Population Bulletin*, *supra*, note 29 at p. 16, and see the address by Toynbee before the Food and Agricultural Organization of the United Nations in Rome, Nov. 2, 1959, reported in the New York *Times*, Nov. 3, 1959:

"But if mankind is now going to save itself from the casualties formerly inflicted upon it by pestilence and war, it is going to bring on itself the new problems of an inordinate increase in population. Our efforts to reduce the death rate must be paralleled by conscious efforts to keep the birth rate under control; for the resources of this planet, even if scientifically administered and developed and husbanded for the benefits of the whole human family, won't suffice forever to feed a population that is increasing *ad infinitum*.

"Sooner or later, food production will reach its limit. If the population is then still increasing famine alone will execute the role that was played in the past by famine, pestilence and war combined." See also Osborn in *Three Essays on Population*, p. 92 (1960).

the size of families. The best scientific data show that at the present rate of population growth, within a relatively short time, survival will be seriously jeopardized. We are practicing disease and death control with amazing success, but birth control in Connecticut is a criminal offense.

Population as affecting the national defense and economic and social security of the United States. The United States has recognized the explosive nature of this problem in significant ways. The Congress has created several successive agencies to administer foreign economic programs. This country in the past 15 years has spent 70 billion dollars on foreign aid, much of it to increase the standard of living in the underdeveloped nations of the world, and, indeed, in some cases to give succor to nations plagued by famine. It is common knowledge that there are areas in the world where the margin between life and starvation for millions is so slender as to disappear altogether on the failure of a staple crop. Our foreign aid, economic as well as military, is justified by the Executive and legislative branches as vital to our national security. It is hardly necessary to cite instances from history when men hungry for food have been goaded by men hungry for power into agitation, rebellion and foreign war. The population crisis in Japan twice within our generation has led that nation into foreign wars in at least one of which many young citizens of Connecticut lost their lives. A third may possibly be avoided in the future if the United States continues indefinitely to subsidize that nation or if the "vital balance" can be attained and maintained."[2]

[2] "If economic and social gains do not surpass population growth and break this cycle of overpopulation and poverty, the governments of many less developed countries may find it increasingly difficult to maintain the confidence and support of their people. Their position will become even more precarious should there be a serious deterioration in living conditions. Modern techniques in medicine and public health have made it possible for mortality to be sharply reduced in the less developed areas before there has been any really substantial economic improve-

There are now parts of the world where the production of food and consumer goods is not keeping up with population growth. For example, food production in Pakistan has been increased by 20% since the end of World War II, in part the result of the United States aid. But the population of that country has increased so rapidly in the same period that there is 10% less food available per person.[57]

By 1954 food production in Burma had increased by 12% since prewar years, but the population had increased by 23%.[58] In Egypt food production was up 31%, population 42%. In Argentina, food 13%, population 39%. In Indonesia, food 11%, people 20%. In Japan, food 6%, population 26%.[59] The

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ment. If fertility remains at traditionally high levels, however, economics expansion must eventually be achieved or death rates will be forced up again. In the long run, a country can have low death rates with all that they imply in the way of economic and social well-being only if a reasonable balance is maintained between population growth and the available resources. Rapid population growth may prove to be one of the greatest obstacles to economic and social progress and the maintenance of political stability in many of the less developed areas of the world." Department of State, *Intelligence Report*, No. 8057, July 23, 1959 at p. 17. See New York *Times*, Nov. 28, 1959.

Dr. John Rock was quoted recently in the New York *Times* as predicting that unless the birth rate of the world is cut "within a short fifty years, hungry and crowded people will rise in bestial strife." Nov. 6, 1958. To the same effect, see Huxley in *Three Essays on Population*, p. 81 (1960).

[57] Bishop, "Agricultural Production in Asia and the Middle East," *Foreign Agriculture*, Vol. XIX, No. 5, p. 92 (1955). An Associated Press dispatch from Karachi on March 9th, 1960 quoted President Mohammed Ayub Khan as warning his people that the country is annually losing ground in its efforts to raise the standard of living. In eight years Pakistan has changed from a food exporting nation into a large scale importer with a chronic hunger problem. New Haven *Register*, Wednesday, March 9, 1960.

[58] *United Nations Statistical Yearbook*, 1955, pp. 21-35 and p. 81.

prospect, therefore, that a world of 6 or 7 billion people will be adequately fed, clothed, and housed is dim indeed.

The total land area of the globe is 35.7 billion acres.[89] Of this, however, only about 4 billion acres are suitable for the cultivation of food and other organic crops.[90] This divides out to less than two acres per person at present population figures. It has been estimated that a minimum of 2½ acres per person is required for sustenance.[91] Others, including the Food and Agricultural Organization, have estimated that one acre of well-cultivated land in the temperate zones is sufficient.[92] But several million of the 4 billion available acres are not in the temperate zones or mid-latitudes. It seems clear that Walker's conclusion is supported by a heavy preponderance of evidence that man's last hope of balancing the food and people equation is population control.[93] The United States is in a poor position to discharge its responsibility of leadership in the solution of a problem as great as any facing the world when voluntary family limitation in one or more of its great states is unlawful.

The economic and social security of the United States is threatened by the population problem. In October, 1958, the Bureau of the Census reported the population of the nation as 175,000,000. It now exceeds 180,000,000.

Even with its vast agricultural resources, the United States will be in trouble within a few years if the present birth rate continues. Enzler estimates that on the basis of 1941-45 crop yields (these were war years with maximum production), the nation could support 203 million persons on a low cost diet, 167 million on a middle-cost adequate diet, 137 million on a high cost ade-

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[89]Walker & Bollis, *Man and Food: The Lost Equation*, p. 14 (1949). (Foreign Policy Association Headline Series, No. 73).

[90]McDougall, *Food and Population*, p. 554 (1952).

[91]Cook, *supra*, note 75, p. 66.

[92]McDougall, *supra*, note 90, at p. 555.

[93]Huxley, in *Three Essays on Population*, pp. 66-67 (1960).

quate diet.[94] Indeed, we may already be in trouble. Only recently, a report from the richest state disclosed that in its richest city one in every six families is "ill clothed, ill housed, and ill fed."[95]

For some years now demographers have developed a concept of the "economic optimum population." Whelpton concluded that the optimum population of the United States may be as low as 100 million.[96]

In considering the optimum population or, indeed, any aspect of the economic future of the United States, the aging of the population is a factor which must be considered. "The findings of studies reviewed show that the results of aging in its early stages tends to reduce the burden of dependency by cutting down the ratio of children too young to work to the total number of persons in the production age groups. At a later state, the relative number of persons too old to work may increase faster than the relative number of children is reduced, with the result that the ratio of dependents to the economically active population rises. Until recently the aging of the population in most of the highly industrialized countries has been such as to reduce dependency; in consequence, most of them are at present in an advantageous position so far as the ratio of the economically active to dependent age groups is concerned. . . . However, if aging continues their position in this respect will deteriorate. For the percentage of aged dependents will eventually mount much faster than the

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[94] *Can the World Feed Itself?* Catholic Association for International Peace, 1950, p. 12; see also, *Resources for Freedom*, President's Materials Policy Commission, Vol. 5, June 1952, pp. 70-71.

[95] New York *Herald Tribune*, June 30, 1958, news story on report of Governor's Interdepartmental Committee on Low Income; Editorial, "Progress Against Poverty," *Industrial Bulletin*, July 8, 1958, (Publication of the New York State Department of Labor), p. 2.

[96] *Forecasts of the Population of the United States*, 1945-1975, pp. 64-65, (1947).

percentage of children falls. Some countries have already begun to pay the penalty for a sharply rising ratio of dependents to producers."[97]

In 1957 the Department of Health, Education and Welfare estimated that by the year 2050, assuming present fertility rates, the population of the United States would exceed 1 billion human beings.[98] Even with a decline in fertility the number may reach a half billion with approximately 16 per cent sixty-five or more.[99] The cost of old age, survivors, and disability insurance under such circumstances would be staggering. "The important question," it is said[100] "is when a decline [in fertility] will begin and how rapid it will be." It is unlikely to decline under laws such as here involved.

Included in the problem of an imbalance between dependents and the producing portion of the population is the cost of rearing and educating constantly increasing generations of children. Minor problems such as transportation, traffic control in urban areas may be left to the imagination. A recent forecast of the

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[97] *The Determinants and Consequences of Population Trends*, U.N. Population Studies, No. 17, p. 254 (1953).

[98] *Illustrative Population Projections for the United States*, Actuarial Study, No. 46, p. 22 (1957).

". . . At present growth rates, population will double in 40 years.

"The United States has not yet caught up with its 40 million increment in population during the last 15 years. Therefore, how can the prodigious population inflation in store to the end of the century be accommodated without weakening the basic social and economic structure of the nation?

"This growth will create new problems and compound many others now pressing for solution. Unless they are faced and solved now, national development will be stunted by the colossal burdens imposed because of the failure of this generation to prepare for those of the future." *Population Bulletin*, Vol. 16, No. 4, pp. 67-68 (1960).

[99] Actuarial Study, No. 46, *supra*, note 98, p. 23.

[100] *Ibid.*, p. 8.

population in Washington's metropolitan area for the year 2000 exceeds four and a half million.[101]

The Bureau of the Census in 1944 made a study of differential fertility rates in 1910 and 1940. In addition to regional, urban-rural and occupational differentials, other differences in fertility were shown amongst socio-economic and educational classes. Generally, it was shown that for several decades people in better economic circumstances had smaller families than those in lesser circumstances. The study showed that three-quarters of a million women who had homes with a rental value of less than $15. per month had produced a replacement of a million and a third daughters—nearly doubling themselves. However, when rental values rose to $30. per month, or anything above that, reproduction fell below the replacement rate.

In regard to the educational levels, the statistics are even more striking. They show that all women who had gone beyond their third year of high school fell short of their replacement quota, whereas those with one to four years of schooling showed the highest replacement rate. The 37,080 women with no schooling were out-numbered more than three times by the 122,580 women who had graduated from college; the former group bore a total of 125,302 children and the latter only slightly more than that. This means that the uneducated group is nearly doubling itself in each generation; the college graduate group is declining by almost half.[102] These statistics refer only to native white women of native parentage, so that no question arises of submerged racial or immigrant groups. However, the pattern in these groups is similar.

". . . Children in larger families have a lower standard of living than those in smaller families, and even at relatively high

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[101]Summary of Materials presented to Sales Executive Club, Washington, Nov. 18, 1957, by J. P. Pickard, Research Director, Washington Board of Trade.

[102]See Cook, *Human Fertility*, p. 221 (1951).

income levels parents meet a large proportion of the cost of their children by cutting expenditure not only on luxuries but also on necessaries like rent, clothing and food. Savings disappear altogether from the budgets of many families as the number of dependent children increases."[103] The following table illustrates the housing facilities for families of different sizes, as found by the Royal Commission.

Average Number of Rooms Occupied by Families of Different Sizes, England and Wales, 1945

(Social Survey Sample of 11,276 Households)

Number of persons in family	Average No. of rooms per family	Average No. of rooms per person	Proportion of Families with less than 1 room per person (Per cent.)
1	3.00	3.00	0
2	4.01	2.01	1½
3	4.33	1.44	9
4	4.58	1.15	19
5	4.56	0.91	44
6	4.95	0.83	72
7	4.87	0.70	85
8	5.09	0.64	93

Other studies confirm these conditions. The lowest birth rates were encountered in families of wealthy people living in large industrial centers, the group comprising college graduates, the professions, and teachers, the "white collar" class of industrial workers, skilled workmen in industry, and rural land owners employ-

[103] *Royal Commission Report on Population*, p. 138 (1949). On Thursday, November 19, 1959, the American Public Health Association issued a carefully worded statement that "full freedom should be extended to all population groups for the selection and use of such methods for the regulation of family size as are consistent with the creed and mores of the individuals concerned." It declared further that serious public health problems are posed when family size impairs the ability to sustain a healthful way of life. New York *Times*, November 19, 1959.

ing high mechanization in their lives. On the other hand, the large families were found in first generation immigrants, urban families or native stock from the lowest economic and social levels, and rural families of low economic and educational status.[104] Although during the 1940-1950 period there was a higher proportionate increase in fertility rates in direct relation to socio-economic status, and, especially, to educational attainment, fertility rates were still inversely related to these factors.[105] Thompson attributes the decrease in differentials to the spread of knowledge of conception control among the urban and rural socio-economic classes.[106] Until this information is "democratized" and spread throughout all elements of the population, reproduction will continue to be "the specialized function of populations in regions of the least economic opportunity."[107]

In contrast to the above are studies of differential fertility in Stockholm, Sweden, where birth control information long has been available to the lower income classes and this has resulted in a complete reversal of the traditional social differentials, as described above. In terms of economics, fertility was found to be in direct proportion to annual income. Couples having an income of at least 10,000 Swedish kroner in 1920 had a birth rate 50% above the rate for couples with an income of less than 4,000 kroner, but even this last-mentioned group had a birth rate perceptibly higher than that of the working class. Simultaneous division according to both occupation and income demonstrated an inverse relation of fertility to income among the industrial laborers. However, in all other occupational groups the observed

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[104]Smillie, *Preventive Medicine and Public Health*, p. 18 (1957).

[105]Kiser, "Changes in Fertility by Socio-Economic Status During 1940-1950," *Milbank Memorial Fund Quarterly*, XXXIII, No. 4, Oct. 1955, 393 ff.

[106]Thompson, *United States Population Problems*, p. 195, (1953).

[107]Stix and Notestein, *Controlled Fertility*, p. 152.

rates increased with income and showed little consistent variation with occupation. Further, the classification according to education of the husband, fertility was shown to be higher for the more educated than for the less educated classes in Stockholm. At each income level the average number of children per family was shown, without exception, to increase from the lowest to the highest education groups. Thus, the highest intramarital fertility was that of the upper classes, regardless of whether these were defined in terms of occupational, economic, or educational status. These statistics were considered to evidence a reversal in Stockholm of the usual social fertility differentials.[108]

The results of the Stockholm studies would seem to provide an effective argument for improvement of the quality of population through the spread of birth control knowledge. They appear to indicate that where there is voluntary choice, there will be a change from an inverse to a direct relationship between social status and income and fertility. Thus, families with less resources will use contraceptive methods as they become available, and, conversely, those with greater social, economic and educational advantages will desire to have and will have greater numbers of children.

Studies have been carried out on groups of native white couples in Indianapolis to ascertain the social and psychological factors affecting fertility.[109] These investigations suggest motivations for family planning in terms of marital adjustment, socio-economic status, intensity of interest in religion, and activities, and attitudes, on the part of the spouses. Among the findings are those showing that positive rather than negative motives are most strong in family planning. The marital adjusted are more apt to plan fertility than the maladjusted. Positive relationships were shown

[108]Edin and Hutchinson, *Studies in Differential Fertility in Sweden*, (1935).

[109]Pratt and Whelpton, "Social and Psychological Factors Affecting Fertility," *Milbank Memorial Fund Quarterly*, XXXIII, No. 4, 430, 462.

between indices of degree of interest in and liking for children and effectiveness of fertility planning. This is attributed by the investigators to a desire to seek the best interests of children and family.

Regarding the correlations with socio-economic status, the figures are interesting to compare with the Stockholm statistics, above. This study shows that among the groups with highest planning (of number and spacing), there is a direct relation of fertility to socio-economic group. Fertility is relatively low, in the group, but the fertility rates increase rather than decrease with rising socio-economic status.[110] Thus, studies on this controlled group seem to show that in the United States also, among those groups free to choose to plan their families, and who do so, those with the greatest resources and the most to offer their children in terms of material comfort, health, education and economic opportunity, will bring forth children in direct proportion to their ability to provide for them.

Everyone will concede that poverty, slums, undernourishment and underprivilege contribute heavily to the crime rate and particularly to juvenile delinquency. The effect of large families among the low economic and social groups is obvious. After a monumental study of contraception from the earliest times in all cultures, Himes declares that the low income groups will use contraceptive information if it is available to them.[111] "Of course, one of the effects of these laws is that there are no birth control clinics, public or private, in the state of Connecticut. The death sentence was pronounced in *State* vs. *Nelson*, *supra*.

In the process of social advance, until recently, the family has been overlooked or given only a minor place in social policy. On the economic side the most important effect is that for most families the addition of children involves a substantial reduction of the family's standard of living; on the non-economic

[110]*Ibid.*, p. 401.

[111]*Medical History of Contraception*, p. 352 (1936).

side the worst effect is felt by mothers who have shared little, if at all, in the great growth of leisure in modern times; and the over-all effect has been to lower the status of the family in the national life."[112]

What we have here is something like this. On the one hand, every phase of science involved has demonstrated that the public welfare of the world, the nation and every constituent part thereof requires effective control of births by the most effective contraceptive devices and the planning of families for health and for socio-economic reasons. On the other, the *a priori* conclusion that public morality is promoted by these laws and a presumption that the legislature of Connecticut knew what it was doing when it enacted these laws in the interest of the public welfare. In other words in exchange for a dubious presumption, the community loses one of its most important social and economic assets, one which, within a short period, as history measures time, may be the key to survival.

6. These laws create intolerable risks of bringing defective children into the world.

Tragic as the case of the Poes is on this record, that tragedy would be compounded if, by some quirk of nature, a mentally defective offspring should survive for an appreciable period. The suffering of the parents, these appellants, would be of an incalculable dimension; as to those of the child, we can also only speculate.

But society, too, has a deep seated interest here. The state of Connecticut maintains two institutions for mentally retarded children. The average number of patients for the fiscal year 1958-1959 was 3,560.[113] If these children survive and marry, they, in turn, may have physically or mentally defective offspring.

[112] *Royal Commission on Population Report* p. 151 (1949).

[113] *Digest of Connecticut Administrative Reports*, to the Governor, 1958-1959 Vol. XIII.

It is not contended that there is much left of the Lombrosian theory of criminology, nor, for that matter of the "neo-Lombrosian" theory which substitutes the psychopathological type for the physical type. And it may well be, as Coleman has pointed out[114] that "it is not the mental deficiency *per se* but the inability of the child to make adequate school or social adjustments that usually results in his delinquency." In any event, it has been demonstrated that feeble minded groups in the community have an unusually large number of delinquencies.[115]

POINT V

These laws are unconstitutional on their face and as applied to appellants Doe and Poes in that their lives and health are put in jeopardy.

The statutes forbidding them to obtain contraceptive medical advice and to use contraceptive devices constitutes an unreasonable infringement of the liberty of these married people because of the risk to life and health which will result from further pregnancies.

In *Tileston* vs. *Ullman* the Connecticut court said:

> "The claim of the state on this point comes down, then to a consideration whether abstinence from intercourse is a reasonable and practical method of preventing the unfortunate consequences. Certainly it is a sure remedy. Do the frailties of human nature and the uncertainties of human passions render it impracticable? This is a question for the legislature and we cannot say it could not believe that the

[114] *Abnormal Psychology and Modern Life*, p. 477 (1950).

[115] See Shelton and Elinor Glueck, *Predicting Delinquency and Crime*, pp. 86, 95 and tables indicated, (1959); Kennedy, *The Social Adjustment of Morons in a Connecticut Town* (Hartford), Commission to Survey Human Resources in Connecticut (1948); Grigg, "Criminal Behavior of Mentally Retarded Adults," *American Journal of Mental Deficiency*, Vol. 52, p. 370 (1948).

husband and wife would and should refrain when they both know that intercourse would very likely result in a pregnancy which might bring about the death of the wife."

"The legislature is the final forum." 129 Conn. 84, 92.

But the legislature is the final forum only in the choice of reasonable alternatives and the overwhelming verdict of medical science is that abstinence is neither reasonable nor practical because normally sexed persons the age of these plaintiffs cannot abstain for extended periods without the development of anxiety neuroses or the impairment of the marriage relation. See Point IV, B, 1. And, although the Connecticut court mentioned only abstinence as an alternative, there are others. It is submitted, however, that they are all unreasonable.

Sterilization. This is unreasonable because persons such as the appellants Poe may, if adequate diagnosis and treatment are obtained, at some future time be capable of having normal children. But sterilization is irrevocable—like the unwanted child. See p. 34, *infra*.

Abortion. This is unreasonable because if for no other reason, in the case of appellant Doe, the termination of a pregnancy could create as great a risk as the birth of a child. Her physicians abandoned their plan to terminate her last pregnancy for this reason after the cerebral hemorrhage.

Divorce. It can hardly be supposed that any one would seriously contend that a reasonable way for a woman in love with her husband to avoid pregnancy would be to obtain a divorce, assuming that it could be lawfully obtained.

Permitted practices to prevent conception. Practices such as abstinence, the rhythm system, the use of the douche, *coitus interruptus* are all so unreliable that the risk involved is unreasonable for women whose life or health would be imperilled by pregnancy. Moreover, as shown elsewhere in many instances, these practices themselves threaten the mental health of both spouses.

The Guttmacher poll of 3,381 physicians with respect to medical indications for conception control gave the following results:[116]

Number and Per Cent of Physicians Approving Conception Control for the Different Indications

Indication	Number		Per Cent	
	yes	no	yes	no
Cardiac	3,002	379	88.8	11.2
Pulmonary disease	2,925	456	86.5	13.5
Renal disease	2,840	541	84.0	16.0
Nervous and mental disease	2,823	558	83.5	16.5
Great Multiparity	2,691	690	79.6	20.4
Hypertension	2,678	703	79.2	20.8
Diabetes	2,571	810	76.0	24.0
Exopthalmic goitre	2,494	887	73.8	26.2
Prevention of inherited disease or malformations	2,447	934	72.4	27.6
Recent pelvic operation	2,419	962	71.5	28.5
General debility and anemia	2,349	1,032	69.5	30.5
Venereal disease	2,239	1,151	66.0	34.0

It thus seems clear that there are no reasonable alternatives to the use of the forbidden contraceptive devices for a woman whose life and health will be put in jeopardy by another pregnancy. In other words, the laws of the state permit these appellants to try to preserve their lives and health—but by the methods least likely to succeed.

But in cases where life is in jeopardy even a reasonable alternative may not save an otherwise unconstitutional act. Thus in *England* vs. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626, 627, the court said: "Under all the cases we think it is that the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills * * *." Certainly it cannot be contended that a young woman for whom another pregnancy involves a serious threat of death adopts an unreasonable choice of treatment when on her physician's advice, she turns to the forbidden contraceptives.

[116] *Human Fertility*, Vol. 12, No. 1 (March, 1947).

These cases, medically, are the reverse of the situation in *Jacobson* vs. *Massachusetts*, 197 U. S. 11, where this Court, referring to offers of proof, rejected by the Massachusetts courts, said: "Those offers, in the main, seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body. What everyone knows, the court must know and therefore the state court judicially knew, as this Court knows, that an opposite theory accords with the common belief and is maintained by high medical authority. 197 U. S. 11, 30.

In *Jacobson* this Court said further: "We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them." So, too, in *Lambert* vs. *Yellowley*, 272 U. S. 581, the Court upheld an Act of Congress limiting the amount of liquor which could be prescribed for medicinal purposes because there was substantial medical authority that spirituous liquor had no medicinal value. ". . . the limitation as to quantity," wrote Mr. Justice Brandeis, "must be taken as embodying an implicit Congressional finding that such liquor had no such medicinal value as gives rise to a need for larger or more frequent prescriptions. Such a finding, in the presence of well known diverging opinions of physicians, cannot be regarded as arbitrary or without a reasonable basis." (272 U. S. 581, 595) Mr. Justice Sutherland, joined by Justices McReynolds, Butler and Stone, dissented because they found no medical opinion to support the limitation on prescriptions.

The situation here is different. There is no appreciable body of "diverging" medical opinion. Insofar as there is any at all, it is negligibly "fractional." These are cases involving life and death. The experience of mankind throughout the ages, supported by the overwhelming opinion of the medical profession, is

that young married couples in love with each other cannot, in the circumstances in which these couples find themselves, save their marriage and their lives by the alternatives available under the law of Connecticut. It is urged that this law is "arbitrary [and] without a reasonable basis."

Under the rationale of *Jacobson*, this law is unconstitutional as applied to these plaintiffs. Mr. Justice Harlan there said:

> "Extreme cases can be readily suggested. . . . It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of health or of his body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied in such a case, or, if it was so intended that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Supra*, at 39.

Under the law of Connecticut as interpreted by the Supreme Court of Errors, these "extreme" cases are included and there is no way by which the medical profession can "protect the health and life of the individual concerned," unless this Court regards itself as "competent to interfere."

Although it may not be true in all societies, certainly human life is among the highest of values in our culture. Even with us, a few stalwart patriots may put the alternatives as liberty or death, but the average citizen prizes his life above his liberty and certainly above his property. It would seem self-evident that life is not to be equated with property in the application of the due process clause of the Constitution. "It cannot be that the Court is more concerned about property losses that are not irremediable than about irretrievable human claims." Mr. Justice Frankfurter, dissenting in *Soleshee* vs. *Balkcom*, 339 U. S. 9, 23. Thus legislation which threatens life will require far more to justify it than that which involves property. A more realistic classifica-

tion would include life with those First Amendment rights which receive the highest protection known to our system of law, the rights to think, speak and freely practice religion.

We do not invoke the phrase "preferred position" of First Amendment guarantees insofar as that phrase may be equated with a presumption of unconstitutionality. We do not argue that there exists such a presumption. At the same time we think it can be maintained, both on the basis of decisions of this Court as well as the language used, that the application of the doctrine of reasonableness to statutes limiting speech and religious practices may produce quite different results than when used in connection with other due process problems. For example, the purpose of keeping the streets clean is insufficient to justify an ordinance prohibiting the distribution of religious literature (*Schneider* vs. *New Jersey*, 308 U. S. 147), although it may be adequate when all that is involved is the distribution of handbills advertising a prize fight or a street carnival. See *Breard* vs. *Alexandria*, 341 U. S. 622.

The standard may well be the same for judging legislation threatening life or making inroads on personal liberty on the one hand and economic freedom on the other. But legislative curtailment of freedom of the market place and the right to acquire and use property may be justified to avert evils which reasonable men would find altogether inadequate in the case of abridgment of speech, the prohibition of the free practice of religion or a serious threat to life itself. In other words, although there may be a presumption of constitutionality of statutes directed at those rights enshrined in the First Amendment and where human life is involved, it is submitted that the burden of overcoming the presumption is far less onerous than in the case of other restrictions. The curtailment in the former situation may be intolerable, whereas reasonable people would regard the price not too high in a situation involving only money.

POINT VI

The Connecticut statutes are unconstitutional on their face, and particularly as applied to appellants Doe and Poes, in that they unreasonably and arbitrarily discriminate against them as married persons.

Presumably *Commonwealth* vs. *Corbett*, 307 Mass. 7 (See *Tileston* vs. *Ullman*, 129 Conn. 84, 91) reflects the law in Connecticut as well as in Massachusetts. See Point II, *infra*. Thus it is not unlawful for a physician to recommend and for persons to use otherwise forbidden devices for the purpose of preventing disease although by so doing they also prevent conception.

The Connecticut law requires a serological test and a certification that parties are free from venereal disease before a marriage certificate can be obtained.[117] When married, presumably the parties are healthy in this respect, and, if they are faithful, will have no occasion to use contraceptives for the prevention of disease. Persons engaged in pre-marital or extra-marital intercourse cannot be expected to have the assurance of a physician's certificate that they will not risk infection—consequently they may employ the devices forbidden to law abiding spouses.

The situation comes to this. The only way married couples may lawfully use contraceptives which unmarried persons may freely employ is for one of them to become exposed to disease by indulging in illicit sexual connection. It is submitted that this is a situation which does not promote public morality.

POINT VII

As to appellant Buxton, these Connecticut laws prohibit him from practicing his profession according to the scientific principles on which it is based and according to his conscience, and

[117] General Statutes of Connecticut, Sec. 46-5 (b), Revision of 1958.

thereby deprives him of liberty and property without due process of law.

That the use of contraceptives is accepted and endorsed by the organized medical profession in this country and by an overwhelming majority of individual physicians, see Point IV, B, 5(a).

Appellant is Professor and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and the Grace-New Haven Community Hospital. As such, it is his duty to teach medical students in the various contraceptive techniques. The law of Connecticut prohibits him from utilizing in his practice the very procedures which he teaches his students to employ. Moreover, he is prevented from giving the medical advice to his patients at the hospital which the profession has demonstrated is in the best interests of their health. In his judgment the use of contraceptives made unlawful by this law is the best method for preserving the life of appellant Jane Doe and the physical and mental health of appellants Poe. The law unreasonably deprives him of his property and his liberty as a physician, sworn by his professional oath to uphold the best tradition of medical science.

This physician has a constitutionally guaranteed right to make a living. The right to work, in Mr. Justice Douglas' words, is "the most precious liberty that man possesses." (Dissenting in *Barsky* vs. *Board of Regents*, 347 U. S. 442, 472.) Not only has he the right to earn a living as a medical practitioner, but he may do so free from "unreasonable and unnecessary restrictions," (Mr. Justice Butler in *Burns Baking Co.* vs. *Bryan*, 264 U. S. 504, 513, and quoted approvingly by Mr. Justice Sutherland in *Liggett Co.* vs. *Baldridge*, 278 U. S. 105, 113). The established doctrine is that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to

some purpose within the competency of the State to effect." *Meyer* vs. *Nebraska*, 262 U. S. 390, 399.

In *Abelson's Inc.* vs. *New Jersey State Board of Optometrists*, 3 N. J. Super. 332, 65, A.2d 644, 648 (Ch. 1949), the court held it was unreasonable to limit the number of branch offices an optometrist could operate as well as to prohibit display of eyeglasses frames and optometrists' diplomas in the window. "While the State's power to regulate those professions which touch or concern the health or welfare of its citizens is clear and long established, that power is none the less subordinate to the rule of reason. It must not be exercised capriciously, arbitrarily or oppressively. The employment of the power must always be reasonably related to legitimate ends sought to be attained." 3 N. J. Super. at 339.

Are the conditions in this case reasonable? This doctor may abort his patient to save her life[118] and he may advise her on methods of preventing conception and death. But he can only advise the most unreliable ones.

It is not denied that the courts presume that a legislature, when it adopts a statute, does indeed have "knowledge of conditions supporting its judgment that the legislation is in the public interest." *Hardware Dealers Mutual Fire Ins. Co.* vs. *Glidden*, 284 U. S. 151. Although the presumption concededly is a heavy one, it is not irrebutable. *Meyer* vs. *Nebraska*, 262 U. S. 390, 400. Now what facts are presented to support the presumption? The record is barren of any legislative findings that this law is in the public interest, that it will contribute to public morality or that it promotes the public health or welfare. All this Court has to go on is the *a priori* judgment that the law prevents illicit intercourse and that the voluntary limitation of the family by scientifically sound devices is not in the public interest. Both judgments are demonstrated to be erroneous.

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[118] General Statutes of Connecticut, Sec. 53-29, Revision of 1958.

Appellant has a property right in his profession. When the state unreasonably deprives him of any valuable attribute of his property, it does so without due process of law. *Buchanan vs. Warley*, 245 U. S. 60. It requires many years of education, training and experience and the outlay of large sums of money to attain the scientific status which he has achieved. In *England vs. Louisiana State Board of Medical Examiners*, 259 F. 2d 626, 627, the court reasoned:

> "Without doubt it is reasonable for the state to outlaw witch doctors, voodoo queens, bee stingers, and various other cults which no reasonably intelligent man would choose for the treatment of his ill, but it would certainly be arbitrary to exclude some, if not all, of the following classes which Louisiana does admit to practice: dentists, osteopaths, nurses, chiropodists, optometrists, pharmacists, and mid-wives. Just where is the dividing line? Under all of the cases, we think it is that the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills, *nor the correlative right of practitioners to engage in the practice of a useful profession.*" (Emphasis added)

It is of the essence of the dedicated professions that the physician, as the lawyer, owes his firm allegiance to the person who has placed his physical, mental or legal welfare in his hands. In both cases it is submitted that it is an unreasonable restriction to prohibit scientifically sound procedures on the basis of judgments, unsupported by facts or conditions, that some fanciful balance of public interest will be thereby advanced. The law of Connecticut prohibits this appellant from protecting the physical and mental health of appellants Poe and the life of appellant Jane Doe, but permits him to protect from venereal disease persons engaged in illicit intercourse. It is submitted that it is impossible to identify this law with the general welfare and equally impossible, to find that it is consistent with any acceptable principle of morality.

We have indicated elsewhere that in certain cases proper medical practice today requires knowledge of and prescription by physicians of contraceptive devices. "The proper prescription of birth-control measures is an important and indeed essential aspect of preventive medicine."[119] Physicians must exercise that reasonable judgment and skill possessed by the average member of their class and if they have additional skill and competence they must utilize that which they have. Thus, the medical practitioner "must keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions." *Stone* vs. *Goodman*, 241 A. D. 290, 294, 271 N. Y. S. 500.

Appellant Buxton departs "from approved methods" only under compulsion of Connecticut law. No one would contend that in Connecticut he would be guilty of malpractice in an action for the death from pregnancy of appellant Doe. But if he practiced his profession in any state but Connecticut or Massachusetts, it is submitted that his failure to prescribe an effective contraceptive device would subject him to liability for failing to exercise that reasonable judgment and skill prevailing among obstetricians and gynecologists in the locality. This, it is urged, goes far toward establishing the unreasonable character of the Connecticut statutes which prevent this physician from exercising the skill and judgment which he has and which is unquestionably established in his profession as the norm for all practitioners in his specialty. Failure to adopt appropriate and customary preventive measures, as well as careless diagnosis or improper treatment may constitute malpractice. *Walden* vs. *Jones*, 289 Ky. 395, 158 S. W. (2) 609; *Jordan* vs. *Skinner*, 187 Wash. 617, 60 P. (2) 697.

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[119]Statement by professors of Obstetrics and Gynecology, New York *Times*, Aug. 1, 1958.

CONCLUSION

Appellants contend that, whatever their constitutional status in 1879, these Connecticut laws are utterly beyond the tolerance point of reasonable men in 1960. On the one hand, they accomplish nothing good. On the other, they interfere mercilessly with the most intimate and sacred experiences in life, they are a hazard to the lives and health of married persons, they unreasonably restrict physicians in protecting their patients and they gravely threaten the stability of family life and the social order.